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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

J. W. GREER, Warden, Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a majority of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, violated this Court's ruling in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), by holding that the court had jurisdiction to accept respondent's appeal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This Petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit sitting *en banc*, in which a majority of the court held that the court had jurisdiction to hear the appeal in this cause.

On January 17, 1969, respondent was found guilty of murder by a Sangamon County, Illinois jury. He was sentenced to serve a term of incarceration of 40 to 70 years. On June 26, 1972, the Illinois Appellate Court affirmed respondent's conviction. *People v. Parisie*, 7 Ill.

App. 3d 1009, 287 N.E.2d 310 (1972). Respondent's petition for leave to appeal was denied by the Illinois Supreme Court.

On March 21, 1979, respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Illinois. On December 18, 1979, the district court, in an unpublished order, granted a motion for summary judgment which had been filed by the petitioner. (Appendix O) The respondent, on May 28, 1980; June 2, 1980; and June 30, 1980, filed notices of appeal. (Appendix K) On July 16, 1980, the petitioner filed a motion in the court of appeals to dismiss the appeal for want of jurisdiction. (Appendix J) That motion was denied on August 14, 1980. (Appendix H)

On February 14, 1982, the United States Court of Appeals reversed the decision of the district court and ordered the writ of habeas corpus to issue. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982) (Appendix G). On June 2, 1982, the court denied the petitioner's petition for rehearing, with suggestion for rehearing *en banc*. (Appendix F)

On June 9, 1982, respondent filed a motion for clarification because the court's June 2, 1982 order did not indicate whether any judge voted to grant the petition for rehearing.

On August 5, 1982, the court granted petitioner's petition for rehearing, with suggestion for rehearing *en banc*. (Appendix B)

The case was reargued, and on March 28, 1983 the court issued an *en banc* decision. Five members of the court held that they had jurisdiction to accept the appeal in this cause; four members voted that they did

not. The court then decided whether, assuming they did have jurisdiction, they could reach the merits of the case. Five members held that the court could reach the merits of the case; three members held that they could not; and one of the judges who had voted against jurisdiction abstained from ruling on this issue. As to the ruling on the merits of the case, four members of the court voted to affirm the decision of the district court denying respondent's petition for writ of habeas corpus; two members of the court voted to reverse the decision of the lower court; two judges voted to remand the case to the lower court; and one judge abstained from ruling on this issue. Thus, because the court was split, 4-4, as to the district court decision, the decision was affirmed. *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983). (Appendix A)

Petitioner files this petition for writ of certiorari with respect to the decision of the court of appeals holding that the court had jurisdiction to hear the appeal in this case.

Counsel for respondent has indicated that he also will file a petition for writ of certiorari with respect to issues other than jurisdiction.

JURISDICTION

The court of appeals' decision was rendered on February 18, 1982. The decision of the court, sitting *en banc*, was rendered on March 28, 1983. This petition is being filed within 150 days of the date of the court of appeals' *en banc* decision holding that the court had jurisdiction to hear the appeal in this cause pursuant to this Court's June 24, 1983 order.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. §1291 reads, in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

28 U.S.C. §2107 reads, in relevant part:

> Except as otherwise provided in this section, no appeal shall bring judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> * * *
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable

neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * *

Rule 58, Federal Rules of Civil Procedure reads, in relevant part:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories the court shall promptly approve the form of the judgment and the clerk shall thereupon enter it. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . . . .

Rule 4(a)(1), Federal Rules of Appellate Procedure reads, in relevant part:

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; . . . .

STATEMENT OF THE CASE

On January 17, 1969, respondent was found guilty of murder by a jury in Sangamon County, Illinois. He was sentenced to a term of 40 to 70 years in the Illinois Department of Corrections. On June 26, 1972, the Illinois Appellate Court affirmed respondent's conviction. *People v. Parisie*, 7 Ill. App. 3d 1009, 287 N.E.2d 310. Attempts to secure review by the Illinois Supreme Court and through post-conviction proceedings were unsuccessful.

On March 21, 1979, respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Illinois. On April 28, 1979, the petitioner filed a motion for summary judgment with supporting memorandum of law. On December 18, 1979, the United States District Court, in an unpublished order, granted petitioner's motion for summary judgment. (Appendix O)

On December 27, 1979, respondent filed a motion for extension of time to file a motion for reconsideration of an order. (Appendix N) On February 1, 1980, respondent filed a motion for reconsideration of an order with supporting memorandum of law. (Appendix M) On May 8, 1980, the district court denied respondent's motion to reconsider. (Appendix L)

Respondent filed three notices of appeal: the first on May 28, 1980; the second on June 2, 1980; and the third on June 30, 1980. (Appendix K) On July 16, 1980, petitioner filed a motion with the United States Court of Appeals to dismiss respondent's appeal for want of jurisdiction. (Appendix J) This motion was denied on August 14, 1980. (Appendix H)

On February 14, 1982, the Seventh Circuit Court of Appeals reversed the district court and directed the court to issue a writ of habeas corpus. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982). (Appendix G) The court did not discuss the jurisdictional question, which had been addressed by the parties in their briefs on appeal.

Petitioner then filed a petition for rehearing and suggestion for rehearing *en banc* again challenging the jurisdiction of the appellate court. On March 16, 1982, respondent was directed to file an answer to petitioner's petition for rehearing. On April 6, 1982, petitioner was permitted to file a reply to respondent's answer.

On June 2, 1982, the court of appeals denied the petition for rehearing in an opinion consisting of three separate concurring opinions. *Parisie v. Greer*, 685 F.2d 1016 (7th Cir. 1982). (Appendix C)

On June 9, 1982, petitioner filed a motion for clarification to determine whether any circuit judge who was not a member of the original panel had voted to allow rehearing of this case *en banc*.

On August 5, 1982, the court, construing petitioner's motion as one for reconsideration, granted petitioner's motion for rehearing *en banc*. (Appendix B)

The court heard reargument on October 19, 1982.

On March 28, 1983, the court entered a *per curiam* order in this cause. *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983). (Appendix A)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE RULING OF THE MAJORITY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SITTING *EN BANC*, VIOLATED THIS COURT'S HOLDING IN *BROWDER v. DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS*, BY ACCEPTING JURISDICTION OF RESPONDENT'S APPEAL.

In the United States Court of Appeals petitioner argued that the court lacked jurisdiction to accept respondent's appeal, due to the fact that respondent had not filed a timely notice of appeal.

The argument was accepted by a four-judge minority and is set forth eloquently and accurately in Judge Wood's dissenting opinion. Appendix A at App. 7 - App. 15. The excellent discussion of this Court's decision in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), makes further discussion of petitioner's position with respect to jurisdiction unnecessary. Judge Wood was joined by Judges Bauer, Coffey and Pell in his dissent.

A majority of the court held that the court did have jurisdiction to accept respondent's appeal. Judge Eschbach, joined by Judges Cudahy, Cummings, Posner and Swygert, held that the court did have jurisdiction of the appeal in this cause. Appendix A at App. 17 - App. 20. Judge Swygert proposed an additional theory of jurisdiction, but was supported by only two other judges. Appendix A at App. 24 - App. 34.

It is from Judge Eschbach's theory of jurisdiction, which commanded a five-member majority of the court,

that petitioner seeks this Court's review. Petitioner submits that this theory is violative of this Court's holding in *Browder*, *id.*

As noted in the statement of the case, the district court order granting summary judgment in favor of petitioner was issued on December 18, 1979. It was not until 156 days later, on May 23, 1980, that respondent filed a notice of appeal.

Judge Eschbach looked to 28 U.S.C. § 1291 in support of his jurisdictional theory. § 1291 states that courts of appeals have jurisdiction of appeals from all final decisions of district courts.

In addition, the judge correctly notes that the fact that there was or may not have been a separate document entry of judgment as required by Rule 58, Federal Rules of Civil Procedure, is not especially important, because it would be ridiculous to send a three-year-old case back to the district court in order to have the court go through the formality of entering a separate document evidencing judgment. Appendix A at App. 18. (Judge Wood's dissent further notes that Rule 58 is nonjurisdictional and may be waived by the parties. Appendix A at App. 14, citing *Turner v. Air Transport Lodge 1894*, 585 F.2d 1180 (2d Cir. 1978), *cert. denied*, 440 U.S. 961.)

Judge Eschbach then proceeded to distinguish, and petitioner submits, wrongly, between "temporal limitations" placed upon appeals, and jurisdiction as set forth in § 1291. The judge states that 28 U.S.C. § 2107, which sets forth the time for an appeal to be filed timely, and Rule 4(a)(1), Federal Rules of Appellate Procedure, which does the same, are merely temporal limitations on one's time for appeal. Appendix A at App. 18, App. 20. He then concludes that because there was no sepa-

rate entry of judgment, the time for appeal never began to run. And because the "clock never started running," it is "conceptually impossible for the appeal to be time barred." Appendix A at App. 20.

Petitioner submits that the judge's holding is in direct conflict with this Court's holding in *Browder*, *id.*, and should, therefore, be remedied by this Court. As Judge Wood notes in his dissent, *Browder* clearly provides that where a notice of appeal is not timely filed (despite the fact that a Rule 60(b) motion was filed), the appellate court has no jurisdiction to review the underlying judgment. Appendix A at App. 13, *Browder*, 434 U.S. at 263 n.7.

Put simply, the district court granted summary judgment in favor of petitioner on December 18, 1979. No notice of appeal was filed until May of 1980. The appellate court had no jurisdiction over this untimely appeal, despite the fact that there was not the "waiveable" formality of the entry of judgment on a separate document. See, *Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3rd Cir. 1983); *Equal Employment Opportunity Commission v. K-Mart Corporation*, 694 F.2d 1055, 1060 (6th Cir. 1982); *Smith v. Mine Safety Appliances Company*, 691 F.2d 724 (5th Cir. 1982); and *Henry v. Estelle*, 688 F.2d 407 (5th Cir. 1982).

The appellate court had no jurisdiction to hear this appeal, in that there was not a timely notice of appeal filed nor was there a timely motion filed which would have stayed the appeal period.

The majority opinion holding that there was jurisdiction should be reversed and petitioner respectfully requests that this Court grant certiorari toward that end.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be allowed to review the decision of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*.

Respectfully submitted,

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1940

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

v.

J.W. GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 79 C 2113—**James L. Foreman**, *Judge.*

ARGUED JUNE 10, 1981—REARGUED OCTOBER 19, 1982
—DECIDED MARCH 28, 1983

Before CUMMINGS, *Chief Judge*, PELL, BAUER, WOOD, CUDAHY, ESCHBACH, POSNER, and COFFEY, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge*.

PER CURIAM. This is an appeal by John Stephan Parisie from the district court's denial of his petition for habeas corpus. A panel of this court reversed the district court and ordered the writ of habeas corpus to issue. 671 F.2d 1011 (7th Cir. 1982). The state petitioned for rehearing with suggestion of rehearing *en banc*, contending that this court lacked jurisdiction of Parisie's appeal. Rehearing *en banc* was ordered. Although the usual practice of this court is to vacate the panel decision when rehearing *en banc* is ordered, this was inadvertently not done in the present case. However, six members of the court (Judges

Pell, Bauer, Wood, Eschbach, Posner, and Coffey), a majority, believe, though for different reasons, that the panel decision should be vacated.

The court, having vacated the panel decision, has decided to affirm the judgment of the district court denying the petition for habeas corpus, although no single opinion commands the support of a majority of the court's members.

Five members of the court—Chief Judge Cummings and Judges Cudahy, Eschbach, Posner, and Swygert—believe that the court does have jurisdiction of Parisie's appeal, but they do not agree on the basis for this conclusion. Judge Swygert, joined by Chief Judge Cummings and Judge Cudahy, proposes one basis, and Judge Eschbach proposes another. Although those joining in Judge Swygert's opinion agree with Judge Eschbach's alternative basis, as does Judge Posner, Judge Eschbach and Judge Posner do not agree with the basis for jurisdiction proposed in Judge Swygert's opinion. The remaining members of the court (Judges Pell, Bauer, Wood, and Coffey), for reasons stated in Judge Wood's opinion, believe that the court does not have jurisdiction of Parisie's appeal.

A majority of the court (Judges Pell, Bauer, Eschbach, Posner, and Coffey) believes that if there is appellate jurisdiction, the court can decide the merits of the appeal even though the petition for rehearing was limited to the question of jurisdiction. Chief Judge Cummings and Judges Cudahy and Swygert disagree for the reasons stated in Judge Swygert's opinion, and Judge Wood (joined by Judge Cudahy) believes that, if the merits are to be reached, the proper course would be to order reargument on the merits.

With regard to the merits, four judges—Judges Pell, Bauer, Posner, and Coffey—believe that the judgment of the district court should be affirmed. Judge Eschbach believes the case should be remanded for the reasons stated in Judge Cudahy's dissenting opinion from the panel decision. Chief Judge Cummings and Judges

Cudahy and Swygert, believing that the panel majority opinion should be retained, would reverse the district court. (Part III of Judge Swygert's opinion explains why he believes the panel decision is correct on the merits.) Since the court is divided equally on whether to affirm the district court, on the one hand, or reverse it and remand the case, on the other, the district court's decision is affirmed, the panel decision having been vacated herewith. A similar conclusion is reached by observing that four members of the court believe there is no appellate jurisdiction and that a fifth, Judge Posner, believes there is jurisdiction but that the district court's decision should be affirmed on the merits. Thus, five members of the court believe, though for different reasons, that the judgment of the district court should not be disturbed.

For the reasons stated, the panel decision is VACATED and the judgment of the district court is AFFIRMED.

BAUER, *Circuit Judge.* I quote from the opinion of the Illinois Appellate Court in a recitation of certain facts in this case, not contested in the proceedings before this court.

> A deputy sheriff testified that the defendant was found asleep in the decedent's car at 5:22 A.M. the same morning [that the decedent was found] and that there was blood on the left front seat, left door and left rear fender of the car. When he was apprehended, the defendant had the decedent's driver's license and credit cards in his own wallet, and he had the victim's cigarette lighter and wallet (containing checks and papers of the decedent) in his pocket. The decedent's sport jacket was found folded on the back seat of the car and in the pocket was decedent's gold wedding ring. The defendant was placed under arrest and remained in the county jail until trial. At the jury trial, Parisie testified on his own behalf and admitted that he shot deceased. He also admitted that he had stolen the pistol used to

kill the decedent during a burglary a few days earlier and that he had fired the pistol in his hotel room before the shooting of the decedent. Parisie was found guilty by the jury and was sentenced by the court to a penitentiary term of 40 to 70 years.

The defense was that of insanity—insanity based upon "homosexual panic." The single constant thread woven throughout the fabric of this appeal is the issue of homosexuality and the theory of defendant attempting to equate "homosexual panic" with insanity. And since this theory underlies some of the specific issues raised, we will consider it at the outset.

* * * *

On the third day of voir dire the defense presented to the court an affidavit of one of the defendant's lawyers wherein he stated that three persons who were presently incarcerated (one in a Tennessee jail, another in an Illinois penitentiary and a third at the Illinois State Farm), if called to testify, would state that each, respectively, had homosexual relations with the decedent, knew decedent's reputation in the community was that of a homosexual, and that decedent had been observed in a "known homosexual hangout" holding hands with another male person. The affidavit was signed by defense counsel and alleged that it was based upon interviews conducted by an investigator.

* * * *

Defendant offered [the same] three witnesses to testify relative to decedent's homosexual reputation. All three witnesses were called to the stand, gave their names and their addresses, and then objection by the prosecution to their further testimony was sustained. The only offer of proof made by defense counsel as to what they would testify to came from defense counsel themselves. In the case of the first

> witness, defense counsel merely stated in chambers that the first witness would testify to three specific acts of homosexuality with the deceased and that the decedent's reputation in the community was that of a homosexual. There was not even that much offer of proof on the other two witnesses, since counsel simply stated that they adopted as offer of proof the affidavit previously filed. When we turn to that affidavit we find that it is one executed by one of defense counsel, containing a mere recitation that the two witnesses had seen decedent in known homosexual locations. The "offer of proof" regarding all three of these witnesses is patently inadequate. They amount to nothing more than conclusionary, broad-sweeping statements of defense counsel and offer no acceptable foundation for admission as reputation evidence. "This court, on numerous occasions, has held that reputation witnesses must be shown to have adequate knowledge of the person queried about and that evidence of reputation, to be admissible, must be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness." *People v. Moretti*, 6 Ill.2d 494, 129 N.E.2d 709, 725. Obviously, the form in which this offer of proof comes to us is insufficient to accommodate the well settled state of the law in this area.

People v. Parisie, 5 Ill. App.3d 1009, 287 N.E.2d 310, 313, 317, 324-25 (1972).

The panel majority opinion brushed aside the fact that the offer of proof failed to meet the standards of Illinois law and rather casually reversed not only this case but the holding of the Supreme Court of Illinois in the *Moretti* decision.

It is worth noting that the state trial court and the state appellate court each addressed the relevancy question and the offer of proof and found against the defendant. As Judge Cudahy pointed out in his dissent to the original panel opinion, this issue was never addressed or developed by the district court in the case before this court.

Judge Cudahy, in footnote 2 of his dissent, stated properly that:

> the majority . . . [argues] that the proffered testimony "involved a great deal more than mere reputation evidence" because the witnesses allegedly would testify about "actual homosexual acts and manifestations" attributed to the victim. *Ante*, at 7. But I think under Illinois law evidence of prior homosexual acts may not be admitted to prove reputation. *See People v. Moretti*, 6 Ill. 2d 494, 129 N.E.2d 709, 725-26 (1955), *cert. denied*, 356 U.S. 947 (1958). The defendant apparently did not articulate at trial or on this or prior appeals any basis other than reputation upon which the state trial judge could have admitted evidence of prior acts by the victim. Rather than joining the majority in merely asserting that the proffered evidence "involved a great deal more than reputation evidence," I believe that we should remand to the district court for a determination of the purpose for which this evidence was proffered and the state law evidentiary rules governing its admission.

I think that to *require* the district court, without further hearing, to issue the writ prayed for by Parisie would be just plain wrong. Illinois courts in the application of their own law are entitled to far more consideration than this would give them.

I recognize that the judges who joined the panel decision, and a minority of the other judges of this court, have taken the position that only the jurisdictional issue was before the *en banc* panel. I do not think this is either required or proper.

Circuit rule 16(b) should not be interpreted as a positive limitation on this court's power. Rather, the rule is intended to insure that the court is properly apprised of the issues meriting reconsideration. If the petitioning party fails in this task, the court has both the power and the duty to raise and consider the issues itself. This court likely would denounce an attempt by a party to construe

these rules as limiting its powers, but that is precisely what Judge Swygert suggests happened here. The failure of the litigants to suggest an appropriate route to rehearing does not limit this court's power to recognize *sua sponte* the exceptional importance of this issue.

Considering all issues involved, I would affirm the decision of the district court on the merits.

WOOD, *Circuit Judge*. The majority finds jurisdiction in this court, but by two opposing views, one authored by Judge Swygert and the other by Judge Eschbach. I respectfully dissent from both.

Even though Judge Swygert makes a strong argument for creating an exception to the Federal Rules of Civil Procedure in order to give us jurisdiction in this case, I must respectfully dissent. I expect that any future cases taking advantage of this vague and flexible new precedent will continually remind us of today's mistake.

On January 17, 1969, Parisie was found guilty of murder by a jury in the Circuit Court of Sangamon County, Illinois, and sentenced to a term of 40 to 70 years. In 1972, the Illinois Appellate Court affirmed the conviction.[1] Attempts at review by the Illinois Supreme Court and post-conviction proceedings were unsuccessful.

The undisputed facts giving rise to this jurisdictional dispute followed ten years later in 1979 and 1980:

April 3, 1979: Parisie, pro se, filed in the district court his petition for a writ of habeas corpus to which the state responded with a motion to dismiss or, alternatively, for summary judgment.

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[1] *People v. Parisie*, 5 Ill. App. 3d 1009, 287 N.E.2d 310 (1972).

December 18, 1979: Judge Foreman awarded summary judgment in favor of the state denying the writ and supporting his order with an unpublished memorandum.

December 27, 1979: Parisie mailed to the district court a pleading entitled, "Motion for Extension of Time to File a Motion for Reconsideration of an Order." Parisie stated he was proceeding under Rule 60 of the Federal Rules of Civil Procedure. Judge Foreman did not rule on that motion.

February 1, 1980: Parisie filed a "Motion for Reconsideration of an Order with Supporting Memorandum of Law" in which he reiterated he was proceeding under Rule 60 of the Federal Rules of Civil Procedure.

May 8, 1980: Judge Foreman denied the Motion for Reconsideration as being without merit.

June 2, 1980: Parisie filed his notice of appeal from Judge Foreman's original order of December 18, 1979, and the subsequent order of May 8, 1980.

July 18, 1980: The state filed in this court a "Motion to Dismiss Appeal for want of Jurisdiction" which was denied by a two-judge panel of this court on August 14, 1982.[2]

It is our obligation to apply the Federal Rules of Civil Procedure as interpreted by the Supreme Court to that sequence of procedural events. Parisie had an easy

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[2] The panel's order denying the state's motion contains no explanation for the ruling, but it is apparent that in any event this court would have jurisdiction of the denial of Parisie's motion for reconsideration of May 8, 1980. The panel's order does not constitute the binding "law of the case" since that is a discretionary concept designed to put issues to rest once ruled upon in a case. It is not dispositive of jurisdictional issues. *Potomac Passenger Ass'n v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975). The jurisdictional issue was again raised by the state in its brief on the merits, but was not addressed in the original panel opinion.

procedure to follow with plenty of time to secure appellate review of the original December 18, 1979 order denying the writ. He needed only to file a notice of appeal within the 30 days provided by Fed. R. Civ. P. 4(a), or within an additional 30 days as provided in Rule 4(a)(5) for cause. In addition, he would have had to seek a certificate of probable cause under Title 28, section 2253. He has demonstrated that he knows how to do these things.

Instead, Parisie sought only to reargue the same issues before Judge Foreman. That is what got him into this jurisdictional problem. He first filed a motion for an extension of time to file his anticipated motion to reconsider which he stated would be a Rule 60 motion. A little over a month later he filed his motion to reconsider. It was timely for a Rule 60 motion, but as that rule plainly states, the filing of a Rule 60 motion does "not affect the finality of a judgment or suspend its operation." If Parisie's motion to reconsider had in fact been a Rule 59 motion, as the majority claims, there would be no argument about a mere change of label, but merely changing the label would not aid Parisie. Rule 59 clearly states that a Rule 59 motion "shall be served not later than 10 days after entry of the judgment." If it had been a Rule 59 motion and timely filed, it would have tolled the running of the appeal period, but it was not. Nor could Parisie's December 27, 1979, motion for an extension of time serve any purpose because Rule 6(b) of the Federal Rules of Civil Procedure clearly prohibits any extension of time for serving a Rule 59 motion.

Parisie's outlawed motion for a continuance, by Judge Swygert's reasoning, is transformed by an interesting process into a Rule 59(e) motion. That is a benevolent fiction fraught with mischief. *Haines v. Kerner*, 404 U.S. 519 (1972), is cited in support, but that is a bold new use of that well-exercised precedent. *Haines* holds only that the allegations of a pro se complaint are to be held to less stringent standards than formal pleadings drafted by lawyers. It does not give a court carte blanche

authority to pretend for jurisdictional purposes that a pro se litigant has done something which he has not done. *Foman v. Davis*, 371 U.S. 178 (1962), is also relied upon by the majority. In *Foman*, a Rule 59 motion was timely filed after judgment and after its denial a timely notice of appeal was filed. The court of appeals narrowly construed the notice of appeal as an appeal only from the Rule 59 motion and not from the underlying judgment because the notice failed to so specify. The Supreme Court in reversing under those circumstances gives Judge Swygert no succor. Nor does *Bradley v. Coughlin*, 671 F.2d 686 (2d Cir. 1982), also relied upon by Judge Swygert, do more. In that case a pro se prisoner filed a Rule 59(e) motion combined with a notice of appeal. So much of the motion as was a 59(e) motion was not timely, but so much of it as was a notice of appeal was timely. The court of appeals merely held that the timely notice of appeal was effective even if the Rule 59(e) portion of the motion was not.

Several additional cases are cited by Judge Swygert, two of the most current ones being *Alley v. Dodge Hotel*, 551 F.2d 442, 444-45 & n.14 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 958 (1977), and *Sea Ranch Association v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058, 1061 (9th Cir. 1976). These additional cases do not fit this case. In *Alley* the parties and the district court agreed that the motion in question "was treatable as one for a new trial or for alteration of the dismissal judgment," and was timely. 551 F.2d at 444-45. The motion appears to have been one of substance, not a motion for a continuance which under the rules can have no effect. *Sea Ranch* is no more than an application of the generally accepted rule that nomenclature is not controlling. The appellants in that case asked for relief which might have been granted under Rule 59(e), but mislabeled it as a Rule 60(b) motion. If we are considering no more than a mere mislabeling case, there would be no dissent.

Those cases are used as the excuse to transform the motion for a continuance into a Rule 59(e) motion which is what is needed to make this appeal timely. That proc-

ess is supposed to work this way, as I understand it. First you change the label on the otherwise useless motion for an extension of time and thereby convert it into a Rule 60 motion. Since that doesn't toll the appeal time by itself, another change has to be worked. The Rule 60 motion for reconsideration which was filed several months after the motion for a continuance is then relabeled to transform it into an amendment to the prior relabeled motion for an extension of time. By that process the motion for an extension of time is finally transformed into a timely Rule 59 motion to toll the appeal period. We are then told that Judge Foreman "appears to have treated the two motions in just the manner we suggest." I suspect that this interpretation may come as a surprise to Judge Foreman. I long ago heard that "you cannot make a silk purse out of a sow's ear," but the Cinderella magic worked on these motions has now cast considerable doubt on that venerable country aphorism.

The need for an alternative basis to support this transformation process is recognized, but nothing more is offered than that it was somehow Judge Foreman's fault anyway and the untimeliness should therefore be excused. It is suggested that Judge Foreman caused the problem by not ruling on Parisie's ineffective extension motion in time for Parisie to correct his error. An analogy is drawn to those cases which recognize an exception when the trial judge actually does something to mislead the party such as we recognized in *Needham v. White Laboratories, Inc.*, 639 F.2d 394 (7th Cir. 1981), *cert. denied*, 454 U.S. 927 (1981). In that case, however, the defendant had filed a timely motion which tolled the appeal period. The district court denied the motion and the appeal time began to run anew. During that time, the defendant filed a second motion, a motion to reconsider. The *Needham* court noted that the second motion did not itself toll the appeal period. However, still within the appeal time, the defendant inquired and was wrongly assured by the trial judge that the motion to reconsider did in fact toll the appeal time. Relying on the court's explicit assurance, the defendant let the appeal period expire. This court, relying on *Thompson v.*

Immigration and Naturalization Service, 375 U.S. 384 (1964) (per curiam), nevertheless permitted the appeal as a "narrow exception" to the general timeliness requirements. Judge Fairchild, in dissent argued, however, that this court's "narrow exception" was broader than the Supreme Court's "narrow exception" and therefore he could find no ground for jurisdiction.

Judge Swygert also finds support in *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), but it, too, is distinguishable. In *Pierre*, the plaintiff filed a Rule 59 motion three days past the 10-day period, but the court dealt with the motion on the merits and denied it. When the motion was denied, however, the plaintiff still had time to file a timely notice of appeal from the original judgment, but did not, arguably on the basis that since the judge had ruled on the untimely Rule 59 motion anyway, plaintiff was entitled to assume that she had additional time to appeal. The Ninth Circuit agreed, finding in those circumstances a narrow *Thompson* exception. It appears that "narrow" can be broadly construed. But, in any event, when Parisie filed his motion to reconsider, the 30-day appeal period had already expired.

Judge Swygert also mentions that the state filed four motions in this court to extend the time for filing its briefs in violation of Circuit Rule 8(a). Those state deficiencies, however objectionable, do not raise a jurisdictional question and are irrelevant.

Judge Swygert concludes by requiring that district judges dispel a pro se litigant's "natural confusion" by either ruling immediately on a motion for an extension of time or advising the party of his mistake. Assuming for a moment that that is the way to require a district judge to conduct the business of his court, let us examine the Parisie situation. Even if the clerk had brought the extension of time motion immediately to Judge Foreman's attention, it would be evident that Parisie still had plenty of time to file his Rule 60 motion, which is what he stated was his intention. Parisie needed nothing then from Judge Foreman. Parisie mentioned neither Rule 59 nor possible appeal in his extension of

time motion. Judge Foreman, in my judgment, was not the least bit at fault. Judge Foreman would have had to immediately contact and confer with Parisie to make sure Parisie really meant what he said, and then advise Parisie accordingly.

I am not opposed generally to trial judges being expected to give some special attention to the problems of pro se litigants in situations where the problem is brought to the judge's attention and the error is apparent. However, if it is to be more than that, then the trial judge will have to continually monitor the clerk's office and somehow make sure that no pro se litigant is making a mistake. It would be better, I believe, for this court to plainly say what the rules provide. That should be enough to educate pro se applicants and those who assist them even if they had, for some reason, not previously understood what the rules clearly provide. That would be a more satisfactory solution than for this court to appoint the trial judge as a "guardian ad litem" for all pro se litigants and to require the judge to consult with and advise them. The tendency to heap those inappropriate additional burdens on trial judges should be resisted.

Finally, there is *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978), which explicitly states that a Rule 59 motion must be made within 10 days of judgment and that late motions do not toll the time for notice of appeal. *Browder* makes it plain that when a party fails to comply with these "mandatory and jurisdictional" time limits, both the district court and this court have no jurisdiction. 434 U.S. at 271, 272.

Browder, on the other hand, does make clear that Parisie's notice of appeal would give this court jurisdiction to review on an abuse of discretion standard the denial of his so-called Rule 60 Motion for Reconsideration. That would not, however, bring the underlying judgment for review, although it would be at least indirectly implicated. This undisputed avenue of review is ignored which, although limited, would avoid the jurisdiction

circumvention we are now to be faced with as precedent. The majority avoids *Browder* and the rules by some "unique circumstances" exception. The exception created is so unique that I must respectfully dissent from that analysis.

In the other jurisdiction theory, Judge Eschbach, not desiring to embrace Judge Swygert's analysis, now advances an original idea not suggested by the parties. Since Judge Eschbach in his individual search of the record we have here finds no separate judgment as required by Fed. R. Civ. P. 58, it is his view that appeal time never commenced. The consequence would be that when Parisie finally did file his notice of appeal it was timely. Since this theory was not advanced by the parties, I hesitate to embrace it. I would prefer the assistance of the parties in assessing the record and the application of the law. In any event the separate document rule is not jurisdictional and may be waived by the parties. *Turner v. Air Transport Lodge 1894*, 585 F.2d 1180 (2d Cir. 1978), *cert. denied*, 440 U.S. 961. On December 18, 1979, in his original memorandum order, Judge Foreman awarded complete summary judgment in favor of the state and denied Parisie's application for the writ. The docket reflected that order. After that there was nothing left to the case. Judge Foreman and all the parties treated that order entered on December 18, 1979, as the final decision. There was no doubt or confusion about it being a final order when it was entered. That plainly appears from all the post-judgment pleadings no matter what their labels. Nor has any party objected to the absence of a separate judgment piece of paper, if there was in fact no such piece of paper. In my judgment the mechanical requirement of the separate judgment rule was clearly waived. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387-88 (1978).

Believing we should take things as we find them and not manipulate the rules to create a rubber precedent merely to reach a particular case, I respectfully dissent from all the views advanced to give this court jurisdiction.

Since a majority of this court is finding jurisdiction contrary to my view, I briefly consider this case on the assumption that we do have jurisdiction.

I believe our order to hear *en banc* vacated the entire opinion of the original panel. That order did not say otherwise nor limit the issue to be considered *en banc*. Nothing but jurisdiction, however, was argued to the *en banc* court. It is obvious that some tentative views on jurisdiction changed after *en banc* argument. Now that jurisdiction is found to exist by the majority, there is some disagreement within the majority about what to do with it. Since the merits were not argued to the *en banc* court, I decline to take any position on the merits. I would, instead, impose on the parties the burden of coming back again to argue all the issues to the *en banc* court, including the four issues not reached by the original panel.[3] After that I would be prepared to take a stand on the merits, but in the present circumstances, I respectfully decline to join my colleagues in either affirming, reversing, or remanding.

I respectfully dissent.

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[3] Additional oral argument is proposed for several reasons. Only two members of this nine-judge *en banc* court have heard argument on any issue except jurisdiction. Judge Eschbach's separate document jurisdiction view was neither briefed nor argued. Oral argument might have produced a majority result in preference to this melange.

CUDAHY, *Circuit Judge*. I was a member of the original panel which decided this case on the merits. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982). At that time I dissented in part from the grant of the writ, arguing that the matter should be remanded to the district court, which had never considered or decided the claim upon which the writ was granted. 671 F.2d at 1017. As a panel member I believed that we had jurisdiction, and I continue in that view. Past practice suggests that we, *en banc*, *could* have raised here *sua sponte* issues going to the merits, *see United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) (en banc) (where the government did not even file a petition for rehearing en banc but only for rehearing by the panel). On the other hand, Judge Swygert has made a persuasive argument to the contrary on this point. In any event, the key fact is that we *did* not hear argument on the merits, for the case was argued to us on the understanding that jurisdiction was the sole issue before us.

Judge Wood, in dissent, suggests that the case be brought back for reargument on the merits. I think this is a splendid suggestion, which I support. In the event that it is not adopted, however, I continue to think that only the jurisdictional question—and not the merits—is presently before this *en banc* court. This is also the view of Chief Judge Cummings who in fact confirmed this posture of the case to the parties at the beginning of the *en banc* oral argument.

As matters presently stand, I concur fully in the analysis of the jurisdictional issue made by Judge Swygert and decline to reach the merits here.

ESCHBACH, *Circuit Judge*. The notice of appeal in this case is not tardy; if anything, it is premature. The district court failed to enter a judgment on a separate document as required by Fed. R. Civ. Proc. 58. Given this failure, the time limit on filing a notice of appeal never commenced running.[1] *United States v. Indrelunas*, 411 U.S. 216 (1973) (per curiam). As explained in *Indrelunas*, the requirement of a separate document for judgment was added to Rule 58 in 1963 to prevent uncertainty over what actions of the district court constitute a final appealable judgment and when the time for appeal begins to run, thus preventing "occasional grief to litigants as a result of this uncertainty." *Id.* at 220. The case before us may present one of the most salutary applications of this admittedly highly technical, mechanical rule. While it was once thought that when this defect was discovered in the record below, a dismissal of the appeal was required in order to permit a proper "final" judgment to be prepared, *e.g.*, *Levin v. Wear-Ever Aluminum, Inc.*, 427 F.2d 847 (3rd Cir. 1970), it is now clear that a court confronted with such a situation may consider the technically premature appeal on the merits without the necessity of a formalistic remand, *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), though it is in our power to remand under appropriate circumstances, *Hanson v. Town of Flower Mound*, 679 F.2d 497, 500 (5th Cir. 1982) (per curiam). In my view, this case would be an inappropriate one to remand for such formalistic purposes, and I therefore believe the appeal should be considered on the merits. *See, e.g.*, *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 690 (4th Cir. 1978).

It is suggested, however, that the separate document requirement is not "jurisdictional" and may be waived by the parties, and hence we should ignore the fact that no such document was entered below. This position, in

[1] This fact also means that the ten day time limit for filing a Rule 59 motion never commenced to run. See Rule 58, 1963 Advisory Committee Notes.

my opinion, represents a basic misunderstanding of the precise jurisdictional issue before us.

As previously observed, the question of whether appellate jurisdiction existed *under 28 U.S.C. § 1291* in the face of a violation of the separate document rule was in some doubt after the Supreme Court's decision in *Indrelunas*. Section 1291, which *confers* jurisdiction on the courts of appeals, requires a "final" judgment, and the question was whether a judgment was "final" if no separate judgment was entered as required by Rule 58. *Mallis* settled that question, holding that the existence of a separate document recording the judgment is not required to make the judgment a "final" one for purposes of § 1291 and that where the parties can be deemed to have waived this defect, a formalistic remand for the purpose of entering such a judgment would spin wheels for no practical purpose. After *Mallis*, our jurisdiction under § 1291 in this case is clear. The fact that the district court and the parties viewed the district court's December opinion as the final decision in the case is germane to the question of whether the decision is a "final" one under § 1291, *Bankers Trust Co. v. Mallis, supra*, 435 U.S. at 385 n.6, and the fact that no party raises the defect of the lack of a separate judgment means that a remand for purposes of entering such a document would be pointless.

The parties' attitude toward the December opinion and their failure to raise the question of the separate document rule are irrelevant, however, in determining whether this appeal is untimely. Unlike § 1291, 28 U.S.C. § 2107 and Fed. R. App. Proc. 4(a) are not affirmative grants of jurisdiction, but rather, are temporal limitations on the right to appeal. Nonetheless, just as we have a duty, sua sponte, to assure that we have § 1291 jurisdiction over any appeal before us, we have a sua sponte duty to assure that the appeal is not time barred by these provisions. In discharging that duty, we must first determine when the time for appeal commenced to run. The Supreme Court, not the parties, tells us what legal event begins the time for appeal, and

it has clearly stated that "a party need not file a notice of appeal until a separate judgment has been filed and entered." *Bankers Trust Co. v. Mallis, supra*, 435 U.S. at 385. This is hardly surprising, since, as *Mallis* observed, the "sole purpose" of the separate document requirement is to fix the point at which the time for appeal (and other time limits) begins to run. *See id.* at 384.[2] Hence, *Mallis* reaffirmed the holding in *Indrelunas* that "the separate document rule must be 'mechanically applied' *in determining whether an appeal is timely*." *Id.* at 386 (citation omitted) (emphasis added).[3] It is our duty[4] to examine the record in this case to ascertain the

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[2] It should be noted that the requirement was instituted in direct response to the uncertainties present when a court enters an opinion which states a motion for summary judgment is granted. *Bankers Trust Co. v. Mallis, supra*, 435 U.S. at 385 (quoting advisory committee notes)—precisely the situation in the instant case.

[3] The Court also stated that the "'rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.'" *Bankers Trust Co. v. Mallis, supra*, 435 U.S. at 386 (quoting 9 Moore's Federal Practice ¶110.08[2], p. 120 (1970)). Moreover, these statements can hardly be considered dicta. In *Mallis* itself, the notice of appeal was filed many months after the appealed from order, and no separate judgment had been entered. The Supreme Court had granted certiorari in the case on the merits but apparently sua sponte stated at the outset of the opinion (which dismissed the writ, never reaching the merits) that the case presented a difficult jurisdictional question concerning the separate document defect which the Court of Appeals had itself recognized sua sponte. On the record before it, the Supreme Court expressly stated that the Court of Appeals properly assumed appellate jurisdiction. While it is true that the Court did not actually expressly state that the appeal was not time barred, its sub silentio holding in that regard, taken in conjunction with the sua sponte nature of its inquiry and the repeated statements concerning the need to mechanically apply the separate document rule to timeliness questions, compels that conclusion.

[4] The duty imposed upon us to conduct *sua sponte* inquiries into jurisdictional questions is a two way street: it is not to be invoked only to defeat jurisdiction. *Cf. Cohens v. Virginia*, 19

(Footnote continued on following page)

date such a document was entered, and if it was entered, to make sure that the notice of appeal was filed within the prescribed time period. If such a document was never entered of record, it is conceptually impossible for the appeal to be time barred because the clock never started running.

In my examination of the record, I have been unable to locate such a document, no one calls such a document to my attention, and hence I am satisfied that the thirty day time limitation on appeals is not a bar to our consideration of this case. While I therefore concur in the conclusion that this court has appellate jurisdiction, I disagree with the analysis set forth in Judge Swygert's opinion.

Regarding the merits of this case, which I consider to be before the en banc court, I am persuaded by my brother Cudahy's cogent opinion dissenting in part from the panel opinion, see 671 F.2d 1011, 1017, that a remand for further proceedings is appropriate.

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[4] *continued*

U.S. (6 Wheat.) 264, 404 (1824) (Marshall, C.J.) ("It is most true that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.") We must decide this question on the record before us, and are obliged to notice the contents of that record, or the lack thereof, even if the parties do not. Principles of waiver, and estoppel for that matter, are simply inapposite in this regard.

POSNER, *Circuit Judge*. There are three issues potentially before us in this case: whether we have jurisdiction of the appeal; if so, whether we can decide the merits of the appeal even though rehearing *en banc* was granted only with respect to the jurisdictional question; if so, what our decision on the merits should be. On the first issue, I agree that we have jurisdiction for the reasons stated by Judge Eschbach, but not for the reasons stated by Judge Swygert. Although I am sympathetic to the policy of interpreting the federal rules of civil procedure liberally for the benefit of pro se prisoner litigants such as this appellant, see *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982), I do not see how a motion for an extension of time to file a Rule 60(b) motion can be considered a Rule 59(e) motion to alter or amend the judgment. Even though the appellant was not represented by counsel when he filed his motion, the motion is literate, precise, professionally competent, and unequivocally a motion for an extension of time rather than to alter or amend the judgment. There is no room for interpretation.

We have no authority to waive the federal rules for pro se litigants. A Rule 59(e) motion tolls the 30-day limit for docketing the appeal, see Fed. R. App. P. 4(a)(4), but it must be filed within 10 days after the entry of judgment, and extensions of time to file it are not allowed, Fed. R. Civ. P. 6(b). Motions under Rule 60(b) and motions to extend the time for filing Rule 60(b) motions do not toll the 30-day limit for docketing appeals. Judge Swygert would treat a motion for an extension of time to file a Rule 60(b) motion as a Rule 59(e) motion. It is a peculiar kind of Rule 59(e) motion, since it contains no grounds for altering or amending the judgment but is just a request for more time to present those grounds. The district judge could not act on the motion till the movant was given a chance to present his grounds—to file, as it were, his substantive Rule 59(e) motion. By this sequence the 10-day limit in Rule 59(e) would be circumvented. We cannot allow this, cf. *Western Transport. Co. v. E.I. Du Pont de Nemours & Co.*, 682 F.2d 1233, 1236 (7th Cir. 1982), even if we overlook the fact that the

appellant here wanted to file a Rule 60(b) rather than a Rule 59(e) motion and that if his motion for an extension of time were deemed a Rule 60(b) motion his appeal would be untimely.

This is not a case where enforcing the federal rules as written would mislead the pro se litigant. The judgment which Parisie is trying to appeal was entered on December 18, 1980, and Rule 4(a)(1) of the Federal Rules of Appellate Procedure required him to file his appeal within 30 days (in fact he filed it more than five months later). Parisie does not argue that he was ignorant of the 30-day limitation for filing his appeal, and nothing in the federal rules, civil or appellate, would lead even a layman to think that the 30-day limitation was tolled by filing a motion under Rule 60(b) or a motion for an extension of time within which to file a Rule 60(b) motion. He might miss the interplay between Rules 6(b) and 59(e) of the civil rules and thereby fail to realize that he could not get an extension of time within which to file a Rule 59(e) motion; but I cannot imagine him thinking that filing a motion for an extension of time within which to file a Rule 60(b) motion would extend the time he had to file an appeal.

Turning to the second issue, I agree with Judge Bauer that we are not prevented from reaching the merits of the appeal by the fact that the state limited its petition for rehearing with suggestion for rehearing *en banc* to the jurisdictional issue. Nothing in 28 U.S.C. § 46(c), Fed. R. App. P. 35, or Circuit Rule 16 requires this court, when it hears a case *en banc*, to limit its consideration to the issues presented in the petition for rehearing as distinct from the issues presented in the appeal itself. When rehearing *en banc* is ordered, new briefs are not filed; instead, the members of the court who were not on the panel are given the original briefs. Thus, they have the same papers before them that the panel had and they can if they wish hear the tape recording of the oral argument made before the panel. It is not unusual for a judge who did not attend the argument to participate in a panel's decision after hav-

ing read the briefs and heard the tape of the argument and there is no greater irregularity when judges who were not on the original panel participate in a decision on an issue briefed and argued before that panel but not raised in the petition for rehearing or argued at the rehearing *en banc*.

Turning, finally, to the merits of the appeal, I cannot agree that the appellant is entitled to a new trial so that he can introduce evidence that his murder victim was a homosexual, or even that a remand for further exploration of the question in the district court is warranted. Parisie wants the evidence admitted in order to bolster his defense of "homosexual panic," which is the idea that a latent homosexual—and manifest "homophobe"—can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual. It is no business of mine whether the State of Illinois chooses to recognize a defense of "homosexual panic" as a subcategory of the insanity defense, but I cannot believe that the Constitution of the United States requires a state to allow defense counsel in a murder case to defame the murderer's victim as a homosexual without satisfying the normal prerequisite to admitting evidence of reputation—that the evidence "'be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness.'" *People v. Moretti*, 6 Ill. 2d 494, 524, 129 N.E.2d 709, 725 (1955), quoted in *People v. Parisie*, 5 Ill. App. 3d 1009, 1034, 287 N.E.2d 310, 325 (1972).

Although it would violate the due process clause of the Fourteenth Amendment for the state to prevent Parisie from putting on a defense at his trial, *Washington v. Texas*, 388 U.S. 14, 19 (1967), it does not follow that any exclusion of relevant evidence is a denial of due process; a panel of this court had occasion to reaffirm this distinction just the other day, see *Carbajol v. Fairman*, No. 82-1587, slip op. 6-8 (7th Cir. Feb. 22, 1983). Reasonable limitations on the admission of relevant evidence are not unconstitutional, and Illinois' limitation of evidence of reputation is reasonable both in general and

as applied to the facts of this case. Especially in a collateral attack on conviction, where passage of time (Parisie was convicted 14 years ago) may make retrial infeasible, the only question should be whether the exclusion of relevant evidence so impeded the defendant's ability to defend himself that it may be said to have deprived him of his right to a fair trial. We must ask not whether Parisie's trial was perfect by our lights, but whether it was fair. Parisie had a fair trial—a trial that, even if not perfect (and what trial is?) satisfied, and by a generous margin, minimum standards of civilized criminal procedure.

SWYGERT, *Senior Circuit Judge*, with whom CUMMINGS, *Chief Judge*, and CUDAHY, *Circuit Judge*, join in Parts I and II.

This case involves appellant John Stephan Parisie's appeal from the denial by the United States District Court for the Southern District of Illinois of his petition for a writ of habeas corpus. The state, contending that this court lacks jurisdiction because Parisie's notice of appeal was untimely, has repeatedly urged that the appeal be dismissed. A motion panel of this court[1] considered and summarily rejected this argument on August 4, 1980. In its briefs and at oral argument before a different panel[2] the state repeated its jurisdictional objection, but on February 18, 1982, the court noted jurisdiction and, reaching the merits, directed that the writ be issued. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982). The state petitioned for rehearing, urging that the jurisdictional holding conflicted with *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978), but the same panel denied the petition in an order distinguishing *Browder*.

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[1] Chief Judge Cummings and Judge Pell.

[2] Judge Cudahy, Senior Judge Swygert, and Senior District Judge William G. East (Judge East sitting by designation).

Parisie v. Greer, 685 F.2d 1016 (7th Cir. 1982). A majority of the active members of the court agreed to rehear the jurisdictional argument *en banc*, so we now consider it for the fourth time.

I

We believe that only the jurisdictional issue, not the panel's disposition of the merits, is before us. This is true for three reasons. First, of the five votes to grant rehearing *en banc*, one[3] specified that it was "confined to the jurisdictional issue." Because that vote was necessary to create a majority of the eight possible votes, its condition limits the scope of our reconsideration. Accordingly, Chief Judge Cummings noted at the start of oral argument on October 19, 1982, that the jurisdictional issue alone was before the court, restricting the appellant's arguments to that issue.

Second, this circuit grants rehearings *en banc* in a limited class of cases, and only the jurisdictional issue satisfies those criteria. Fed. R. App. P. 35(a) provides in part that a "rehearing [en banc] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance." The use of the term "ordinarily" in this rule acknowledges that the court has the power to sit *en banc*, *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 327-35 (1941), and that "[t]he manner in which that power is to be administered is left to the court itself." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 259 (1953). This court has determined to exercise its

[3] Judge Pell's. Similarly, Judge Cudahy voted to deny rehearing on the ground that only the jurisdictional issue was presented. As he noted in the comment accompanying his vote, he would have voted to grant rehearing had the merits been presented because he had dissented in part from the decision of the panel.

power only in the two situations suggested in rule 35(a). Circuit Rule 16(b) provides:

> *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.

The state does not claim that the panel's disposition of the merits is especially important or inconsistent with any other decision of this or another court, but only that the jurisdictional ruling conflicted with the decision of the Supreme Court. Under this court's criteria for rehearings *en banc*, therefore, only the jurisdictional issue qualified for reconsideration. *See United States v. Rosciano*, 499 F.2d 173, 175 (7th Cir. 1974) (per curiam) (when issue was neither the subject of conflict nor of exceptional importance, rehearing *en banc* was dismissed as improvidently granted). *Cf. United States v. Doe*, 455 F.2d 753, 762 (1st Cir.), *vacated on other grounds sub nom. Gravel v. United States*, 408 U.S. 606 (1972); *Local No. 1505, IBEW v. Local Lodge No. 1836, International Association of Machinists*, 304 F.2d 365, 368 (1st Cir. 1962), *vacated on other grounds per curiam*, 372 U.S. 523 (1963); *Anderson v. Knox*, 300 F.2d 296, 297-98 (9th Cir. 1962).

Finally, only the jurisdictional issue was presented by the appellee. Both the Federal Rules of Appellate Procedure and our circuit rules require that petitions for rehearing state what points should be reconsidered. Fed. R. App. P. 40(a) provides in part that

> [t]he petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

Circuit Rule 61(b), quoted above, states a similar requirement. In its petition the state claimed only that "[t]he reason for granting this request is that this Court's decision is in direct conflict with the United States Supreme Court's decision in *Browder*." Even if this court had the *power* to grant rehearing on the merits, therefore, that power was not invoked. The state did not request such reconsideration, nor were the merits briefed to the court *en banc*, nor did the state object when Chief Judge Cummings noted that argument would be limited to the sole issue raised. Just as the Supreme Court does not address issues (other than jurisdictional ones) not presented in the petitions for certiorari and cross-petitions, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979), and just as the courts of appeals do not address unchallenged findings of the trial courts, *In re Air Crash Disaster*, 644 F.2d 594, 608 n.9 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981), so this court should not reconsider issues not raised in the petition for rehearing. *Cf. Teitelbaum v. Curtis Publishing Co.*, 314 F.2d 94, 95-96 (7th Cir.) (court will decline review when a party fails to comply with circuit rule requiring appendix of the matters sought to be reviewed), *cert. denied*, 375 U.S. 817 (1963).

II

The district court granted the state's motion for summary judgment on December 18, 1979. On December 27, 1979, Parisie, acting *pro se*, mailed a motion to extend the time for filing a motion to reconsider, on which the court never ruled. The basis for this request, to which the state did not object, was Parisie's lack of access to the prison law library because of abbreviated holiday hours. Parisie filed his motion to reconsider on February 1, 1980, and the district court denied it on the merits on May 8, 1980. Parisie filed a notice of appeal on June 2, 1980.

The state argues that this court lacks jurisdiction to review the summary judgment because Parisie did not file a notice of appeal within thirty days of that order, as

required by Fed. R. App. P. 4(a)(1). It admits that a timely motion under Fed. R. Civ. P. 59(e) for amendment of the judgment would toll the running of the thirty-day period, *see Browder v. Director, Department of Corrections*, 434 U.S. at 264, and that a fresh thirty days would be available following the denial of such a motion to file a notice of appeal, *see* Fed. R. App. P. 4(a)(4). The state contends, however, that Parisie's motion for reconsideration was not timely, because motions under rule 59(e) must be made within ten days of entry of judgment, and that time limit cannot be extended. *See* Fed. R. Civ. P. 6(b). It concludes that Parisie's motion for extension was ineffectual, that his motion to reconsider and notice of appeal were therefore untimely, and that this court consequently lacks jurisdiction. We reject this argument for three alternative reasons.

A

First, we agree with the analysis presented by Judge Eschbach, *ante*. We need not fully repeat here his reasoning that no timeliness problem exists because the thirty-day notice-of-appeal period was never triggered by the entry of judgment on a separate document as required by Fed. R. Civ. P. 58. But we do wish to respond to the objections of the members of the court who reject this analysis in reliance on *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam).

In interpreting the separate-document requirement of rule 58, the Supreme Court held that in the absence of such a document (which is plainly lacking from the record in the present case) the notice-of-appeal period is never started and the deadline thus never accrues. *United States v. Indrelunas*, 411 U.S. 216, 221-22 (1973) (per curiam). Some courts of appeals, including this one, interpreted this holding on the time for appeal to have an additional jurisdictional consequence, and declined to take jurisdiction of appeals from judgments not entered on a separate document on the ground that such judgments were not final. The Supreme Court rejected

this interpretation in *Bankers Trust Co. v. Mallis*, 435 U.S. at 386, holding that the separate document is not a jurisdictional prerequisite. Rule 58 therefore has only timeliness, and not jurisdictional-prerequisite consequences: the absence of the separate document keeps the time for appeal running, but does not bar appeal. *Mallis* does not hold that the separate-document requirement can be waived for timeliness purposes. On the contrary, *Mallis* authorizes us to take jurisdiction in this case, and we have no authority to refuse it because on the issue of timeliness rule 58 is absolute.

B

Even apart from the consequences of the separate-document rule, we find the state's jurisdictional objections to be without merit, for we may construe Parisie's December 27 motion as a motion to reconsider under rule 59(e) rather than as a mere request to extend time. Because formal pleading requirements are relaxed for *pro se* litigants, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), the court may recharacterize motions in order to rescue such litigants from technical traps into which they have stumbled unawares. In *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), for example, the Court construed a notice of appeal from the denial of a rule 59(e) motion as a notice of appeal from the underlying judgment in order to preserve review of the merits. The Court emphasized that the appellee was not misled or prejudiced by the technical defect because an earlier, ineffective notice of appeal had been filed, and "[t]aking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest." *Id.* at 181. The Court concluded that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.* Similarly, in *Bradley v. Coughlin*, 671 F.2d 686, 689-90 (2d Cir. 1982), the court treated a *pro se* filing that combined a motion under rule 59(e) and a notice of appeal as a simple notice

of appeal, excusing the litigant's mischaracterization because to do otherwise "would elevate form over substance, which is especially inappropriate in a *pro se*'s case." *Id.* at 690.

Characterizing Parisie's motion for extension as a rule 59(e) motion responds to the concerns expressed in *Foman* and *Bradley*. As in *Foman*, the state would not be misled or prejudiced by the change in label, because Parisie's intention to ask the court to reconsider was made clear within the ten-day limit. The purposes of that time limitation—to hasten corrections of defects in judgments and to assure prompt appeals if the corrections requested are denied—were therefore served by Parisie's timely but mislabeled motion. *Cf.* Fed. R. App. P. 3(e), 1979 Advisory Committee Notes ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with"). The February 1 motion for reconsideration may be treated under this reading as an amendment to the earlier motion.

It is no objection to this construction that Parisie styled his February 1 motion as one under rule 60(b). It is generally true that "[a] party should not be bound at his peril to give the proper nomenclature to his motion; this would be a retreat to the strict common law. So long as he makes a timely motion that states the ground ther[e]for, the court should grant relief appropriate thereto." 6A J. Moore, Federal Practice ¶59.12[1], at 59-278 to 59-279 (2d ed. 1982) (footnotes omitted). *See Dove v. CODESCO*, 569 F.2d 807, 809 (4th Cir. 1978) (rule 60(b) motion treated as rule 59(e) motion because "if a post-judgment motion is filed within ten days of the entry of judgment it should be treated as a motion under Rule 59(e), however it may be formally styled"); *Alley v. Dodge Hotel*, 551 F.2d 442, 444-45 & n.14 (D.C. Cir.) (same), *cert. denied*, 431 U.S. 958 (1977); *Sea Ranch Association v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058, 1061 (9th Cir. 1976) (same); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 554-55 (5th Cir. 1964) (same); *Southern States Equipment Corp. v. USCO*

Power Equipment Corp., 209 F.2d 111, 116-17 (5th Cir. 1953) (same); 6A J. Moore, Federal Practice ¶59.04[7], at 59-26 & n.13 (2d ed. 1982); *id.* ¶59.12[1], at 59-278 to 59-280 and cases cited therein; 7 *id.* ¶60.29, at 414 n.4. *See also* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."). This principle of construction has even more force in the case of *pro se* motions. *See* discussion in Part II-C below. Because the district court in the present case considered the motion under both rule 59(e) and rule 60(b) when it ruled on the merits, we are assured that we are not relying on hindsight to impose unrealistic burdens.

It is also no objection to this construction that both motions were mislabeled. Once we decide that nomenclature is unimportant, we ought not to keep count of our indulgences and apportion each litigant only one, unless by multiplication of allowances we would distort reality. No such distortion is present here. Parisie apparently felt compelled to comply with some ten-day filing requirement, so we cannot be assured that he knowledgeably relied on rule 60 alone; and the motion he did make within ten days served the purpose of that time limitation.

In fact, the district court appears to have treated the two motions in just the manner we suggest, for it never ruled on the motion for extension as such, but ruled only once, on the merits. Its failure to rule on the first motion may be interpreted as a tacit characterization of that motion as one under rule 59(e), later amended by the motion of February 1.[4]

The state conceded at oral argument that had Parisie styled his December 27 motion as a motion to reconsider,

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[4] If, however, the district court ruled on the merits because it failed to recognize its lack of jurisdiction, it shows by its example that the requirements of the federal rules can be confusing. This demonstration buttresses the argument of Part II-C below.

despite its lack of a researched supporting legal memorandum, he would have satisfied the time limitations. The state nevertheless urged that our power of review must turn on this nonfunctional distinction. We cannot agree. As in *Foman* and *Bradley*, such a distinction without a difference does not defeat jurisdiction.

C

Even if we do not recharacterize Parisie's motion for extension, the lateness of his motion to reconsider (which he styled a rule 60(b) motion but which was treated by the district court as one brought under rule 59(e)) may be excused. It is true that *Browder v. Director, Department of Corrections*, 434 U.S. at 261 n.5, 264-65, holds that rule 59(e) motions must be made within ten days of judgment, and that late motions cannot toll the time for a notice of appeal. An exception to this rule exists, however, when the actions of the district court mislead a party who still has time to file a notice of appeal into allowing that opportunity to lapse. In such a case the party's noncompliance is excused even though the district court lacked the power to enlarge the time limit. *See Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (per curiam); *Thompson v. INS*, 375 U.S. 384, 387 (1964) (per curiam); *Fairway Center Corp. v. U.I.P. Corp.*, 491 F.2d 1092, 1093 (8th Cir. 1974); *Motteler v. J.A. Jones Construction Co.*, 447 F.2d 954, 955-56 (7th Cir. 1971); *Eady v. Foerder*, 381 F.2d 980, 981 (7th Cir. 1967); 6A J. Moore, Federal Practice ¶59.09[3] (2d ed. 1982); 9 J. Moore, B. Wald & J. Lucas, Federal Practice ¶204.12[2] (2d ed. 1982); 4 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1168 (1969). This exception has been reaffirmed post-*Browder*. *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (7th Cir.), *cert. denied*, 454 U.S. 927 (1981); *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1354-55 (9th Cir. 1980).

In most of these cases the district court misled the parties by actually granting extensions of time that were beyond its power, or by making other explicit assurances

that appeal rights would not be lost. Such explicitness is not essential to the so-called "unique circumstances" exception to *Browder*, however. In *Pierre v. Jordan*, 333 F.2d 951, 955 (9th Cir. 1964), for example, a notice of appeal filed within thirty days of the denial of an untimely motion under rule 59(e) was held timely, because the district court had entertained the motion and decided it on the merits, lulling the layman appellant into the belief that plentiful time for appeal existed when in fact that time was expiring.

In many ways the present case is like *Pierre*. In both, the district court treated the motion as timely; in both, the movant acted *pro se*; in both, the opposing party objected only on the merits and not on the ground of untimeliness.

In some respects, however, Parisie's case is stronger: he actually attempted to file within the ten-day limit for rule 59(e) motions, but was physically unable because of lack of access to the prison library. When he filed his motion for extension of time, he obviously failed to realize that such extensions are not allowed. This mistake is understandable, for the exception to the general rule that enlargements of time may be granted for cause, Fed. R. Civ. P. 6(b), is not evident from the face of rules 59 and 60. Moreover, Parisie had been faced throughout his suit with the example of the state's repeated requests for extensions, always after the fact.[5] It is therefore not remarkable that Parisie overlooked rule 6 and assumed that such extensions are always permitted. The district court's failure to rule on the motion to extend seemed to confirm that assumption. It would be particularly ironic

[5] The state filed four motions to extend the time for filing its brief before this court, each time past the deadline prescribed by Circuit Rule 8(a), and the last time despite the court's admonition that further tardiness would not be tolerated. Moreover, its *petition for rehearing*, which was due on March 4, 1982, was not filed until March 5; Judge East granted the state's request to file the brief instanter on March 11, 1982.

to hold that Parisie should have filed his notice of appeal despite the apparent pendency of his motion to reconsider, because if the motion were actually pending, the notice of appeal would have had no effect. *See Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400, 403 (1982) (per curiam). To hold a *pro se* litigant to such fine distinctions with such large consequences would be uncommonly strict.

In such a case of natural confusion by a *pro se* litigant, we may expect the district court to dispel the error, either by ruling on the motion or by advising the party of his mistake. This duty should be less burdensome than the one we found in *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982), because it is triggered only when it is evident that a party misapprehends the rules, rather than being required as a prophylactic warning in every case. But even if uncorrected confusion is inevitable because of practical difficulties in monitoring the docket, the district court's blamelessness should not penalize the litigant. When the court is silent in the face of such manifest error, the party is no less misled than in the cases of explicit misadvisement noted above. Because Parisie was so misled, this case falls within the "unique circumstances" exception to *Browder*.

We conclude that, because Parisie's appeal was timely on any of these alternative grounds and because jurisdiction was the only question to be reconsidered, our inquiry is at an end. This court's disposition of the merits of the appeal, *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982), should not be disturbed.

III

Although I believe that the posture of this case renders consideration of issues other than jurisdiction unnecessary, I wish to respond to the views of other members of the court on the merits. My disagreement with those views is threefold.

A

Parisie was convicted under Ill. Rev. Stat. ch. 38, ¶9-1 (1981) of murdering Robert Jackson. His defense was that Jackson, who had picked up the nineteen-year-old Parisie in his car, driven up a lonely road, and parked, made a homosexual advance that triggered in Parisie an irrational and disproportionate response, which either mitigated the degree of the crime, *see id.* ¶9-2(b) (voluntary manslaughter) (response not reasonably justified by the circumstances), or rendered him insane in that situation, *see id.* ¶6-2 (lack of substantial capacity to appreciate criminality or conform conduct to law), and therefore lacking the state of mind necessary for conviction under ¶9-1.[6] He labeled this response "homosexual panic," and was permitted at trial to submit psychiatric evidence that certain circumstances were likely to trigger such a response in him. His attempts to bolster his assertion that the triggering event—the homosexual advance—had occurred, however, were frustrated by the trial court's exclusion of testimony that Jackson had a reputation as and was a homosexual. Although the court acknowledged that such testimony was "very important" and "would be admissible," it granted the widow and children's motion in limine and issued an order prohibiting the mention of the victim's homosexuality. Hearing tr. 11-14-68 at 22-23, 29. Accordingly, the proffered testimony of three witnesses that they had had homosexual relations with Jackson and knew his reputation as a homosexual was rejected. The exclusion of this evidence was particularly damaging to Parisie's defense because during closing argument the prosecutor stated

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[6] Parisie therefore did not urge, as some members of this court fear, that the court create a new species of insanity defense based on "homosexual panic." Rather, his argument was based on the unremarkable principle that evidence of panic from any source (only incidentally related to homosexuality in this case) is relevant to the issue of the defendant's state of mind.

that "[n]o evidence [had been presented] that this man, Mr. Jackson, is or was a homosexual. . . . You know, it is very easy to accuse somebody of being a homosexual." Tr. 1734, 1738.

On review the Illinois Appellate Court upheld the conviction over Parisie's objection that the evidence had been wrongly excluded, on the ground that the issue had not been preserved by an adequate offer of proof. *People v. Parisie*, 5 Ill. App. 3d 1009, 1033-34, 287 N.E.2d 310, 325 (1972). It reasoned that

> "reputation witnesses must be shown to have adequate knowledge of the person queried about and that evidence of reputation, to be admissible, must be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witnesses."

Id., quoting *People v. Moretti*, 6 Ill. 2d 494, 523-24, 129 N.E.2d 709, 725 (1955), *cert. denied*, 356 U.S. 947 (1958). Two members of this court view the state's application of its procedural rule as a bar to federal review of the fairness of the trial.

Procedural defaults of this kind do not always act as such a bar, however. If a defendant shows "cause" for his failure to comply with a state's procedural rule and resultant "prejudice" from the alleged constitutional violation, a federal court may entertain his habeas petition. *See Wainwright v. Sykes*, 433 U.S. 72, 84-87 (1977). Moreover, it is possible that a federal court need not blindly defer to the state's application of its own procedural rule, but may investigate whether the state misapplied its rule so as to shelter the alleged underlying constitutional violation from federal scrutiny. The Supreme Court has taken this course in analogous cases: it will not review state determinations of federal questions when an adequate state ground equally supports the state's decision, but it does inquire whether the state misconstrued its own law in scrutinizing the adequacy of the state ground. *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Ward v. Board of County Commissioners*, 253 U.S. 17, 22-

23 (1920); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 456-59 (1816). By the same reasoning, if the Illinois court misconstrued its own offer-of-proof requirement in the present case, habeas review of the underlying constitutional issue should not be precluded.

Habeas review is available here under either of these rationales. The proof offered at the time the testimony of the three witnesses was excluded was defense counsel's statement that the witnesses would testify that they were acquainted with the deceased, knew his reputation as a homosexual, and had engaged in homosexual acts with him; plus counsel's similar statement in an affidavit presented during the hearing on the motion in limine, incorporated at trial by reference. There was ample "cause" for not offering more rigorous proof, because Illinois courts tolerate offers of proof made by attorneys rather than by the witnesses themselves, although they recognize that the practical purposes of the offer-of-proof requirement are sometimes better served by taking the witnesses' testimony out of the presence of the jury. *See People v. Duarte*, 79 Ill. App. 3d 110, 123-24, 398 N.E.2d 332, 343 (1979); *People v. Johnson*, 47 Ill. App. 3d 362, 372-73, 362 N.E.2d 701, 709 (1977) ("Although defense counsel here did not make a formal offer of proof by calling Flynn to the stand and making a record of his proposed testimony out of the presence of the jury, he did make clear to the court what Flynn's testimony would be if he were allowed to testify. . . . A formal offer of proof may have been preferable, but under the circumstances we think that defense counsel's statement to the court was sufficient to serve the purposes of an offer of proof: to give the trial court an opportunity to ascertain the admissibility of the offered evidence and to enable the reviewing court to determine whether there was prejudicial error in excluding the evidence."). Indeed, the Illinois courts hold that "an offer of proof is unnecessary whenever the trial judge understands the objection and character of the evidence but will not admit such evidence." *Schusler v. Fletcher*, 74 Ill. App. 2d 249, 253, 219 N.E.2d 588, 590 (1966). *See also Lindley v. St. Mary's*

Hospital, 85 Ill. App. 3d 559, 566-67, 406 N.E.2d 952, 958 (1980); *People v. Johnson*, 47 Ill. App. 3d at 373, 362 N.E.2d at 709; *People v. Limas*, 45 Ill. App. 3d 643, 650, 359 N.E.2d 1194, 1199 (1977); *People v. Moore*, 27 Ill. App. 3d 337, 344, 326 N.E.2d 420, 425 (1975). In this case the court understood the nature of the evidence offered, and excluded it because it had determined in advance to exclude categorically any evidence relating to the homosexuality of the victim. It did not hold that the testimony was incompetent as a substantive matter for lack of a foundation concerning the source of the witnesses' knowledge about the deceased. If the defendant was required at all under Illinois law to freeze the excluded testimony itself in order to preserve the issue for appeal, which I doubt, the apparent state of the law was sufficient "cause" for the procedural default. This is not a case like *Engle v. Isaac*, 102 S. Ct. 1558, 1572-75 (1982), in which the defendant, relying on the apparent state of the substantive law, failed to make any attempt to preserve his objection.

Even if the issue was properly preserved, however, the exclusion of the evidence might have been proper under state evidence law, and if so, habeas relief would be precluded unless constitutional considerations outweighed the state's interest in its procedural rule. *See Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973). But the trial court acknowledged that the evidence "would be admissible," and I do not doubt that evaluation.

There is no consensus even in the medical and psychiatric communities whether homosexuality is a character trait (which would generally be provable under Illinois law only by evidence of reputation, *see People v. Collins*, 25 Ill. 2d 605, 611, 186 N.E.2d 30, 33 (1962), *cert. denied*, 373 U.S. 942 (1963)) or a medical condition (which would surely be directly provable by evidence of symptoms). In either case, however, evidence of Jackson's homosexuality would be relevant under the Illinois standard of relevancy, *see People v. Peter*, 55 Ill. 2d 443, 459, 303 N.E.2d 398, 408 (1973) (relevant evidence is that "which tend[s] to make the proposition at issue more or

less probable"), *cert. denied*, 417 U.S. 920 (1974), because his homosexuality made it likelier that he made a homosexual advance toward Parisie. *Cf. Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960) ("almost any kind of evidence showing what kind of man the decedent was would be highly relevant in helping the jury to determine whether the appellant's story of a sexual assault was truthful"). Indeed, this logical relevancy was played upon in the prosecutor's statement during closing argument that it was unlikely that a non-homosexual made such an advance. The Illinois Appellate Court's assertion that the homosexuality of the victim did not make the insanity of the defendant more likely, *People v. Parisie*, 5 Ill. App. 3d at 1034, 287 N.E.2d at 325, may be true but is misguided: that was not the logical link the defendant sought to prove.[7]

The special restrictions on the use of evidence of character (if homosexuality is a character trait) do not counsel exclusion of the evidence despite its logical relevance. In comparable situations Illinois courts have admitted evidence of the character of the victim in order to show action in conformity with that character. *See, e.g., People v. Davis*, 29 Ill. 2d 127, 129-30, 193 N.E.2d 841, 843 (1963) (violent disposition of deceased used to show aggression on a particular occasion); *People v. Dorff*, 77 Ill. App. 3d 882, 884, 396 N.E.2d 827, 828 (1979) (promiscuity of victim used to show consent to intercourse, prior to enactment of rape shield statute). The Federal Rules of Evidence generalize the rationale in such cases, providing that pertinent character traits of victims may be proved. Fed. R. Evid. 404(a)(2); *see* 10 J. Moore & H. Bendix, Federal Practice § 404.13 (2d ed. 1982). It seems likely that Illinois would do the same

[7] This case differs from *People v. Limas*, 45 Ill. App. 3d at 649, 359 N.E.2d at 1199, for the same reason: there the court rejected the defendant's argument that a logical link existed between homosexuality and violent aggression on a particular occasion.

because it has recognized the absence in such cases of the considerations that counsel restraint in using character evidence against an accused. *People v. Baer*, 35 Ill. App. 3d 391, 396, 342 N.E.2d 177, 181-82 (1976) (allowing evidence of specific prior acts rather than mere reputation evidence to prove aggression by a victim). *See* 1 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 198 (1940).

Moreover, if homosexuality is more like a medical condition than a character trait, the reasons for excluding character evidence have even less applicability. Evidence of the condition would demonstrate something akin to capacity or opportunity: it is as if Parisie's argument were that Jackson had lunged toward him in an epileptic seizure, and proof of the victim's epilepsy were attempted. In that case, proof of prior seizures or other direct evidence of the condition, rather than reputation evidence, would be appropriate.

I note that to the extent that character was provable by prior specific acts, or to the extent that the object of proof was a medical condition, the argument concerning the adequacy of the offer of proof vanishes. The offer-of-proof rule invoked by the appellate court concerns only reputation evidence, not evidence of specific acts,[8] and Parisie's counsel's offer to prove such acts was unambiguous. We therefore have an alternative ground for reaching the merits of the alleged constitutional violation.

The reason the trial court excluded all testimony concerning the victim's homosexuality despite its acknowledged relevance appears to have been concern about its possible harmful effect on the victim's family. I

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[8] It is improper to say that Parisie sought to present evidence of specific acts in order to demonstrate Jackson's reputation. What he sought to prove was character; reputation and specific-act evidence are alternative ways of proving that trait. *See* J. Wigmore, A Treatise on the Anglo-American System of Evidence § 52 (1940) ("Character and reputation are as distinct as are destination and journey."); Fed. R. Evid. 405.

assume that this decision did not constitute an abuse of discretion under applicable state law. The ultimate questions in this case are whether state law is entitled to authorize that choice, limiting the defendant's constitutional right to present a defense, and if not, whether the erroneous exclusion rendered the trial unfair.

A defendant's right to call witnesses in order to present a defense, rooted in the sixth amendment and applied to the states through the due process clause of the fourteenth amendment, *see McMorris v. Israel*, 643 F.2d 458, 460-61 & n.3 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1479 (1982), is strong. *Green v. Georgia*, 442 U.S. 95, 96-97 (1979) (per curiam); *Chambers v. Mississippi*, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("This right is a fundamental element of due process of law."). If I were deciding, as an issue of first impression, whether the state's solicitude for the victim's reputation could override this strong constitutional right, I would not hesitate to conclude that it could not. I am spared making even that decision, however, for the Supreme Court has reached the same conclusion in weighing similar interests. In *Davis v. Alaska*, 415 U.S. 308, 319-20 (1974), it held that a state's interest in protecting the anonymity of juvenile offenders by preventing impeachment on the basis of their juvenile records could not outweigh the defendant's interest in cross-examining witnesses against him:

> Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the inference of possible bias . . . .
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> . . . .
>
> . . . [T]he State's desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

If anything, in *Davis* the state's interest in shielding its youth was stronger than the state interest here, because it was a generalized, statutory policy choice rather than the discretionary choice of a single judge. I conclude that the exclusion of the testimony was not warranted by a sufficiently strong state interest.

I also conclude that the exclusion rendered the trial unfair. *See Chambers v. Mississippi*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. at 22, 23. The constitutional violations and resulting unfairness in this case justify the issuance of a writ of habeas corpus.

B

Even if it disagrees with my view of the merits of the objection to the exclusion of evidence, this court ought not affirm the district court's denial of the writ without considering Parisie's other objections. The panel opinion found dispositive its conclusion that Parisie had been denied his right to present a defense, and therefore did not reach the additional arguments concerning the lack of impartiality of the jury because of pretrial publicity and the restricted scope of voir dire, prosecutorial misconduct, and ineffective assistance of counsel. By ignoring these issues once it rejects the argument the panel found dispositive, the court deprives the defendant of complete review.

C

Finally, I disagree with Judge Posner's assertion that speculations about the feasibility of retrial should enter our analysis of the propriety of habeas relief. That view appears to mistake the nature of habeas relief by overlooking the fact that habeas cases necessarily arise some time after trial due to the requirement that defendants exhaust state remedies, and by assuming that the risk that constitutional errors resulted in an erroneous determination of guilt shifts at some point to the defendant. It is true that some constitutional objections are not

cognizable on collateral review if an opportunity for full and fair litigation was available on direct review. In *Stone v. Powell*, 428 U.S. 465, 493-95 (1976), the Supreme Court held that such direct review was adequate to fulfill the deterrent purpose of the exclusionary rule in search-and-seizure cases. It emphasized, however, that its holding was limited to the exclusionary-rule situation because to allow habeas relief there would add little deterrent benefit at the cost of truthfinding. *Id.* at 494 n.37. The same is not true when the constitutional violation affects the truthfinding process, as here. Accordingly, in *Jackson v. Virginia*, 443 U.S. 307, 323 (1979), the Court held that the reasoning of *Stone v. Powell* does not apply when an alleged violation relates to "the basic question of guilt or innocence," despite a full and fair hearing of the issue in state court, because otherwise the principle of habeas relief would be negated:

> This argument would prove far too much. . . . Congress in [28 U.S.C.] § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. . . . What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured.

Jackson v. Virginia, 443 U.S. at 323. We have no authority to interpolate among the congressional prerequisites for habeas relief an additional requirement that retrial be possible.

IV

I believe that because there was no jurisdictional impediment to this court's consideration of this appeal, the opinion of the panel should not be disturbed. If I were to reconsider the merits of the appeal, however, I would adhere to the determination of the panel that a writ of habeas corpus should issue.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

No. 80-1940 vs.

J. W. GREER, Warden Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
Civil No. 79-2113—**James L. Foreman**, *Judge.*

ORDER

On consideration of the petition for rehearing,* together with an *en banc* suggestion, and on consideration of the answer thereto, a majority of this Court voted in favor of rehearing the case *en banc*. Therefore the petition for rehearing *en banc* is hereby granted.

---

* A panel rehearing was denied on June 2, 1982.

APPENDIX C

No. 80-1940

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 2, 1982

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

vs.

J. W. GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 79-C-2113—**James L. Foreman**, *Judge.*

ORDER

The question presented by the State's petition for rehearing involves the filing of a Rule 59 motion. Although Parisie characterized his motion as a Rule 60 one, he was acting pro se. The substance of the motion

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

was a Rule 59 one—a motion to reconsider. Moreover, Judge Foreman treated it as a Rule 59 motion and the State did not object to this treatment.

There is no doubt that the motion to reconsider was not timely filed. Nonetheless, several considerations justify waiving the technical-time requirement.

First, we must consider Judge Foreman's initial failure to treat Parisie's motion for an extension of time. It is perhaps true that the Rules do not allow an extension of time to file a Rule 59 motion. But if Judge Foreman had ruled quickly to that effect and had informed Parisie that the time to move for reconsideration had passed, then Parisie could have filed a timely appeal to this court on the merits. Instead the judge sat on the motion, allowed Parisie to file his motion to reconsider, and considered the motion on the merits. The State did not object to this treatment. Given the pro se nature of Parisie's work, it was quite reasonable for Parisie to conclude that the failure to rule on his motion for an extension of time still left him in the trial court.

Second, when Judge Foreman treated Parisie's motion on the merits the State never objected. The State should have raised this issue before Judge Foreman to permit him to confront it. Even when the State finally objected on appeal, it failed to show prejudice. In every single memorandum on this issue (to the motion panel, to the panel itself, and in its petition for rehearing), the State failed to show how Parisie's pro se technical failure prejudiced the State. Moreover, given the State's repeated inordinate number of requests for continuances in this court, it can hardly plead prejudicial delay.

Third, all these events involved a pro se litigant working under the worst possible conditions. Parisie stated in his affidavit accompanying his motion for an extension of time that he could not get access to the law library in the prison and could not have his papers typed and mailed to meet the ten-day requirement. Access to these things is never easy in prison, but condi-

tions were exacerbated because of the Holiday Season. Parisie's only failure was a technical one involving timeliness. Courts have often recognized the special latitude given pro se litigants. *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, does not hold otherwise. In *Browder* it was the *State* that failed to file timely, and on those facts the Supreme Court strictly enforced the timeliness requirement. Here we have a pro se litigant who failed to file timely. This factual difference is crucial.

There are two reasons for the time limitations to file a Rule 59 motion. First it alerts the district judge of the grounds for a new trial or a reconsideration without too much delay following the verdict or judgment. Second, it starts promptly the appellate process if such is undertaken. However, the ten-day limitation is not inflexible. Professor Wright has written:

> A motion for a new trial, stating grounds therefore, must be made within 10 days after the entry of judgment. Though the tendency has been to apply this strictly, and to hold that neither waiver nor estoppel nor acquiescence by the opposing party can permit the court to act on an untimely motion, a doctrine has developed allowing relief where a party has been misled by action of the court purporting to enlarge the time, even though the court lacks power to make such an order.

Wright, Law of Federal Courts, § 95 at 469. *See also* 9 Moore's Federal Practice § 204.12[2]. Cases supporting the proposition that extenuating circumstances may provide relief from the ten-day limitation for the filing of a Rule 59 motion include *Thompson v. INS*, 375 U.S. 384, 386-87 (1964); *Eady v. Foerder*, 381 F.2d 980, 981 (7th Cir. 1967); *Fairway Center Corp. v. UIP Corp.*, 491 F.2d 1092, 1093-94 (8th Cir. 1974). Here ample extenuating circumstances exist; it would be inequitable and unjust to allow a miscarriage of justice because of a technical failure by a pro se litigant.

CUDAHY, *Circuit Judge*, Concurring:

Although I dissented in part, on the merits, from the panel opinion, I concur here in the denial of the state's petition for rehearing with suggestion for rehearing *en banc* on jurisdictional grounds. Moreover, I agree with Judge East that both the majority disposition and his own suggested disposition of the rehearing petition present acceptable grounds to sustain appellate jurisdiction. The denial of the rehearing petition is, I believe, buttressed in part by the state's failure to raise its untimeliness objections to Parisie's post-trial motions before the district court. It would be helpful to have in the record the thinking of the district court rather than to be forced to infer merely from the sequence of events how the district court characterized Parisie's motions and what jurisdictional conclusions it drew from its own characterizations. Denial of rehearing is further supported by the decision of a prior panel of the court (Chief Judge Cummings and Judge Pell) in denying before oral argument the state's motion to dismiss for the very reasons now urged in the petition for rehearing. The state chose to seek rehearing on jurisdictional grounds rather than on the merits. I do not accept the state's jurisdictional argument, an argument which has been previously rejected by two different panels of this court. Admittedly we are not barred by any doctrine of repose from examining at any point our own jurisdiction, but as a practical matter the history of decisions here weighs significantly against the state's argument.

EAST, *Senior District Judge*, specially concurring:

I specially concur in the conclusion of the majority that this court held appellate jurisdiction.

The majority reaches that conclusion through the route of Rule 59, Fed. R. Civ. P., and the case law. I do not disagree on that score. However, I do believe that an equally rational alternate route to appellate jurisdiction is available through Rule 60(b)(6), Fed. R. Civ. P., and the case law.

The District Court, without an oral hearing and proceeding solely upon Parisie's pro se papers, entered a summary judgment in favor of Greer on December 18, 1979. On February 2, 1980, Parisie filed his pro se motion with supporting memorandum, for reconsideration of the December 18, 1979 final judgment. The District Court recognized that "liberal construction is to be accorded material drawn *pro se*" and entertained the merits of the motion for reconsideration. *Wilson v. Phend*, 417 F.2d 1197, 1199 (7th Cir. 1969). *See also Haines v. Kerner*, 404 U.S. 519 (1972); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972). Thereupon the District Court considered the motion as having been made under both Rule 59 and Rule 60 and ultimately denied the merits of the motion for reconsideration on May 8, 1980. Parisie timely filed a notice of appeal from that denial order.

Mr. Justice Blackmun entered a concurring opinion in *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, at 272. I find the following sentence at the close of page 274 more challenging than disarming:

> Under these circumstances [respondent's disavowal of reliance on Rule 60(b)], I see no obligation on this Court's part to attempt to rescue respondent's case on a Rule 60(b) basis.

In its published disposition of this case, this court held that the District Court committed reversible error in failing in its summary judgment to consider and adjudicate the decisive constitutional issue of "[w]hether Parisie was deprived of his Sixth Amendment right to present a defense when the trial court refused to allow three crucial defense witnesses to testify."

Here the pro se defendant acted as promptly as his circumstances of imprisonment would permit to alert the attention of the District Court to the lack of its consideration and adjudication of the decisive issue of whether he had been accorded constitutional due process throughout his state court criminal trial. He clung to every procedure open to him.

I would elect to consider the cause here as a timely appeal from the District Court's denial of the merits of a Rule 60(b)(6) motion for reconsideration of the December 18, 1979 summary judgment.

In *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949), the Court held that Rule 60(b)(6), for all reasons except the five particularly specified in Rule 60(b)(1)-(5), "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." The denial of a Rule 60(b)(6) motion is a final order within the meaning of Federal Rules of Appellate Procedure 4(a), and is thus appealable. *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. at 263 n.7. However, the filing of a Rule 60(b)(6) motion neither affects the finality of the original judgment nor tolls the time limit for taking an appeal from that judgment. *Id.*; *Ellingsworth v. Chrysler*, 665 F.2d 180, 183 (7th Cir. 1981); *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 397 n.4 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3268 (U.S. Oct. 13, 1981). Thus, a Rule 60(b)(6) motion does not bring up the underlying judgment for appellate review, and a ruling on such a motion is reviewable only for an abuse of discretion. *Browder v. Director, Ill. Dept. of Corrections; Ellingsworth v. Chrysler; Ben Sager Chemicals International, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977).

A grant of relief under the circumstances here will not violate the policy of preventing Rule 60(b)(6) from being used to circumvent the requirement of a timely notice of appeal. *See Fox v. Brewer*, 620 F.2d 177 (8th Cir. 1980); *Oliver v. Home Indemnity Co.*, 470 F.2d 329 (5th Cir. 1972). Parisie can in no sense be said to have made a "free, calculated, deliberate" choice not to appeal from the summary judgment. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950).

I conclude that the District Court abused its discretion in not considering and adjudicating Parisie's re-

newed constitutional due process claim through a reconsideration of the delinquent summary judgment.

Ordinarily, the cause should be remanded to the District Court for such a reconsideration in light of the pertinent authorities cited in the court's published decision herein. However, since we have the same record before us that would be before the District Court, and the parties have fully addressed us on the issue through the briefings, we should deem that judicial expediency and the furtherance of justice demand that we meet the issue and make a disposition now in the light of the pertinent authorities cited in the published decision.

I join in the majority's denial of Greer's petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 11, 1982

Before

Hon. WILLIAM G. EAST, Senior District Judge*

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

No. 80-1940 vs.

J. W. GREER, Warden Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 79 C 2113—**James L. Foreman**, *Judge*

On consideration of the "MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC, INSTANTER", filed herein on March 8, 1982, by counsel for the respondent-appellee,

IT IS ORDERED that said motion is hereby GRANTED and the Clerk of the Court is directed to file herein instanter the twenty-five (25) tendered copies of respondent-appellee's petition for rehearing and suggestion for rehearing in banc.

* Honorable William G. East, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1940

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

vs.

J. W. GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC, INSTANTER

Now comes Respondent-Appellee, by his attorney, Tyrone C. Fahner, Attorney General of the State of Illinois, and moves this Court for leave to file his Petition for Rehearing and Suggestion for Rehearing In Banc, instanter.

In support of this Motion, Respondent-Appellee states:

1. Attorney for Respondent-Appellee, Michael V. Accettura, was informed by the Clerk of this Court on March 5, 1982 that his Petition for Rehearing and Suggestion For Rehearing in Banc was received on March 5, 1982;

2. Respondent-Appellee mailed his 25 copies of the Petition to this Court on March 3, 1982, the day before the Petition was due. Respondent-Appellee fully expected said Petition to be timely received by this Court.

3. Respondent-Appellee was informed, however, that the briefs were not received until one day after their due date;

4. WHEREFORE, in that Respondent-Appellee had completed and mailed his Petition a full day before the due date of the Petition, and due to the fact that the one day delay will not cause any prejudice to Petitioner-Appellant, Respondent-Appellee respectfully requests this Court grant his Motion;

5. This Motion is made in good faith and not for purposes of delay.

Respectfully submitted,
TYRONE C. FAHNER
Attorney General
State of Illinois,

Attorney for Respondent-Appellee.

By /s/ VAL GUNNARSSON
VAL GUNNARSSON
Assistant Attorney General
State of Illinois

MICHAEL V. ACCETTURA
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500 South Second Street
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Phone: 217/782-1090
Of Counsel.

Served: March 5, 1982

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1940

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

vs.

J. W. GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. 79-C-2113—**James L. Foreman**, *Judge Presiding.*

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

TYRONE C. FAHNER
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State of Illinois
MICHAEL B. WEINSTEIN
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500 South Second Street
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COUNSEL FOR RESPONDENT-APPELLEE.

AUTHORITIES CITED

CASES:	PAGE
Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978)	1, 2, 3, 4
Butler v. Pearson, 636 F.2d 526 (D.C. Cir. 1980)	4
Needham v. White Laboratories, Inc., 639 F.2d 394 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3276 (U.S. Oct. 13, 1981)	3, 4

STATUTES:	
Fed. R. Civ. P. 52	2, 3
Fed. R. Civ. P. 59	2, 3
Fed. R. Civ. P. 60	2, 3
Fed. R. App. P. 4(a)(5)	3

[PETITION PAGE 1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1940

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

vs.

J. W. GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 79-C-2113—**James L. Foreman**, *Judge Presiding.*

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Respondents, by their attorney, TYRONE C. FAHNER, Attorney General of the State of Illinois, petition this Court, pursuant to Rules 5 and 40 of the Federal Rules of Appellate Procedure and Circuit Rule 16, to reconsider its decision in this case and suggest that a rehearing in banc is appropriate.

The reason for granting this request is that this Court's decision is in direct conflict with the United States Supreme Court's decision in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978).

[PETITION PAGE 2]

ARGUMENT

BECAUSE PETITIONER FAILED TO FILE A TIMELY NOTICE OF APPEAL AND FAILED TO TOLL THE TIME PERIOD FOR APPEAL BY A TIMELY POST-TRIAL MOTION, THIS COURT LACKED JURISDICTION TO HEAR THIS CAUSE.

On December 18, 1979,[1] the United States District Court for the Southern District of Illinois entered an order granting summary judgment against the petitioner.[2] On January 29, 1980, the petitioner filed a Motion for Reconsideration pursuant to Rule 60 of the Federal Rules of Civil Procedure. Thereafter, petitioner filed numerous notices of appeal; the first on May 28, 1980; the second on June 2, 1980 and the third on June 30, 1980.

On July 16, 1980, respondent filed with this court a Motion to Dismissal Appeal for Want of Jurisdiction. That motion was summarily denied on August 18, 1980. Respondent also raised the question of jurisdiction in his Brief on Appeal. Brief at 4-7.

In *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), the Supreme Court expressly held that the 30 day time period for filing a notice of appeal is "mandatory and jurisdictional." 434 U.S. at 264. The Court noted that the 30-day period may be tolled by the filing of a *timely* motion to reconsider pursuant to Rule 52(b) or 59 of the Federal Rules of Civil Procedure. Additionally, a district court may extend the

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[1] This Court incorrectly stated that the district court order was entered on December 13, 1979.

[2] This Court incorrectly stated that the district court did not review the state court record. *See* December 18, 1979 Order at 2-8.

[PETITION PAGE 3]

30-day period an additional 30 days "upon showing of excusable neglect or good cause, ..." *Fed. R. App. P.* 4(a)(5).

In the instant case, the district court's order was entered on December 18, 1979. On January 29, 1980, petitioner filed a Motion for Reconsideration with the district court. This motion stated that it was filed pursuant to Rule 60 of the Federal Rules of Civil Procedure. As such, the motion was timely filed.[3] However, the Court in *Browder* also held that a motion filed pursuant to Rule 60 of the Federal Rules of Civil Procedure *does not* toll the time for filing of a notice of appeal. 434 U.S. at 263 n.7.

Petitioner's first notice of appeal was not filed until May 28, 1980, more than five months after the entry of the district court's order granting summary judgment. Since the time for filing a notice of appeal is jurisdictional, it is, therefore, clear that this court lacked jurisdiction to entertain the appeal where the notice of appeal was untimely filed.

Finally, this court has held that it will have jurisdiction to entertain an appeal which is untimely filed "if the defendant relied to his detriment on the *assurance* of the district court that an untimely post-trial motion tolled the thirty-day notice of appeal time." *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (1981), *cert. denied*, 50 U.S.L.W. 3276 (U.S. Oct. 13, 1981) (Emphasis supplied). This court defined "assurance" as "explicit assurance that the motion is timely". *Needham*, 639 F.2d at 398.

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[3] If the January 29, 1980 motion were to be construed as a Rule 52 or Rule 59 Motion it clearly would be untimely. *See Browder*, 434 U.S. at 261 n.5.

[PETITION PAGE 4]

In the instant case, the district court never ruled, commented or communicated with petitioner in any way with respect to his Motion for Reconsideration. As such, this case clearly does not fall into the "*Needham* exception" to *Browder*. *See also Butler v. Pearson*, 636 F.2d 526, 528-529 (D.C.Cir. 1980).

Since petitioner's notice of appeal was not timely filed and the time period for filing was not tolled by the filing of a timely post-trial motion, this court lacked jurisdiction to entertain this appeal. Thus, this court's decision in this cause is in direct conflict with the United States Supreme Court's decision in *Browder* and should be reconsidered.

CONCLUSION

For the foregoing reasons, respondent asks this court to grant a rehearing or rehearing in banc in order to reconsider its order reversing the district court's denial of the instant Petition for Writ of Habeas Corpus.

Respectfully submitted,

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COUNSEL FOR RESPONDENT-APPELLEE.

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1940

JOHN STEPHAN PARISIE,

Petitioner-Appellant,

v.

J. W. GREER, Warden
Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
Civil No. 79-2113—**James L. Foreman**, *Judge.*

ARGUED JUNE 10, 1981—DECIDED FEBRUARY 18, 1982

Before SWYGERT, *Senior Circuit Judge*, CUDAHY, *Circuit Judge*, and EAST,* *Senior District Judge.*

EAST, *Senior District Judge*:

THE APPEAL

The petitioner-appellant (Parisie) appeals the adverse summary judgment entered by the District Court on December 18, 1979 in his 28 U.S.C. § 2254 state prisoner habeas corpus proceedings. We note jurisdiction and reverse.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

FACTS

Since the facts surrounding the tragedy of Jackson and Parisie are relatively unimportant to the appeal, we deem the following narration to be sufficient.

Jackson was seen leaving a scout meeting about 8:45 p.m. on Friday, April 12, 1968. About 10:45 p.m., a tow truck driver, on his way to pick up a car, found Jackson standing along a lonely country road outside the City of Springfield. Jackson said he had been shot, and he asked to be taken to a hospital. When Jackson was admitted to the hospital about 11:30 p.m., he had in his possession a money clip containing $210, a watch, and a masonic ring with a large stone which appeared to be a diamond. Jackson, after surgery, died the next morning.

On that same morning, at about 5:20 a.m., Parisie was found asleep in Jackson's car located in Springfield. Parisie had Jackson's driver's license and a gasoline credit card in his wallet, and Jackson's wallet was in Parisie's coat pocket. Jackson's wedding ring was found in a pocket of the decedent's sports jacket, which was folded on the back seat of the car.

PROCEEDINGS IN THE ILLINOIS STATE COURTS

A grand jury returned an indictment to the Circuit Court for Sangamon County, Illinois (trial court) charging Parisie with the murder of "Chet" Jackson.[1] A trial

[1] The murder statute in effect at the time of petitioner's state court trial, Ill. Rev. Stat. ch. 38, § 9-1 (1967) provided:

> (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.
>
> (b) Penalty. . . .

jury found Parisie guilty of the alleged crime on January 17, 1969. On February 27, 1969, the trial court sentenced Parisie to a prison term of forty to seventy years.

At this juncture, we note that prior to trial it was apparent to the trial court, the State, and friends of the deceased that Parisie in defense would claim that the deceased made homosexual advances toward him. At that time, a private attorney representing members of the decedent's family presented a motion *in limine* seeking to prevent Parisie from characterizing the deceased as a homosexual. During an in-chambers hearing on November 14, 1968, the private attorney stated:

> I represent the widow and three young children of the decedent. And the nature—I am informed and believe that the nature of the allegations will be devastating to the character and reputation of the decedent. They are untrue . . . .

Although the trial court recognized that evidence of "homosexuality can be very important" and "would be admissible," it nevertheless entered an order prohibiting defense counsel from mentioning Jackson's homosexuality "in public or *in the trial*" (emphasis supplied).

During the first day of voir dire, the trial court asked some of the veniremen the following question:

> There may be some evidence in this case of homosexuality. If the evidence should show any person whose name comes up during the trial of this case was involved in acts of homosexuality, would that fact alone create prejudice or sympathy for that person?[2]

However, the trial court then reversed itself and announced that it would no longer ask such a question "until it is shown that the defendant will be prejudiced."

On the next day defense counsel moved for reconsideration of the ruling in light of the fact that there were

---

[2] One juror said: "You can't expect me to say this isn't going to make any difference to me if this man was a homosexual."

three persons who could testify that they had had homosexual relations with Jackson, who knew his reputation in the community was that of a known homosexual and who had observed Jackson in known homosexual hangouts holding hands with other males. The motion was denied without comment.

None of the twelve jurors chosen were asked about their views on homosexuality.

The Illinois Appellate Court affirmed the conviction on June 26, 1972, *People v. Parisie*, 7 Ill. App.3d 1009, 287 N.E.2d 310 (1972). Attempts to secure review by the Illinois Supreme Court and through post-conviction relief proceedings were denied.

Parisie has been incarcerated since his arrest on April 13, 1968 and is currently an inmate at Menard Correctional Center in Menard, Illinois.

PROCEEDINGS IN THE DISTRICT COURT

Parisie filed his pro se § 2254 habeas corpus proceedings in the District Court on April 3, 1979, together with supporting memoranda. On April 30, 1979, the State of Illinois, through its Attorney General, moved to dismiss the petition and cause and/or for summary judgment in its favor.

On December 13, 1979, the District Court, without holding an evidentiary hearing or reviewing the state court record, entered summary judgment against Parisie. On May 6, 1980, Parisie's motion for reconsideration was denied. An appropriate notice of appeal was filed on June 2, 1980, and on June 26, the District Court issued its certificate of probable cause for the appeal as required by 28 U.S.C. § 2253.

PRIOR PROCEEDINGS IN THIS COURT

On July 23, 1980, Parisie filed his pro se brief for appellant and petitioned for the appointment of appeal counsel. This court on August 18, 1980 denied the State of Illinois' motion for dismissal of the appeal for want of

a timely notice of appeal, and on September 4, 1980 appointed legal counsel with leave to file supplemental briefing.

ISSUES ON REVIEW

Parisie presents the following issues:

1. Whether Parisie was deprived of an impartial jury:

   (a) as a result of massive pretrial publicity; and

   (b) when the trial court precluded him from questioning prospective jurors about bias or prejudice against homosexuality on the part of either the deceased or himself.

2. Whether Parisie was deprived of his Sixth Amendment right to present a defense when the trial court refused to allow three crucial defense witnesses to testify.

3. Whether the prosecutor's admittedly improper tactics violated Parisie's Fourteenth Amendment due process rights.

4. Whether Parisie was deprived of effective assistance of counsel.

5. Whether the cumulative effect of the errors rendered Parisie's murder trial fundamentally unfair and in violation of due process guaranteed by the Fourteenth Amendment.

DISCUSSION

Issue 2:

Since we consider issue 2 of primary importance and dispositive of his appeal, we meet it first.

The issue under this assignment of error was raised in the Illinois Appeals Court and in Parisie's memorandum of April 13 and July 2, 1979, filed in support of his habeas petition in the District Court. Through oversight or other reasons, the State did not address the Dis-

trict Court on the issue. Nor did the District Court deal with the issue in the opinion of December 18, 1979, supporting the summary judgment.

Under such circumstances, it would ordinarily be the better practice to remand the issue to the District Court for the first opportunity to decide the issue. However, we have the same record before us that would be before the District Court, and the parties have fully addressed us on the issue through the briefings. Furthermore, Parisie has been in custody for more than thirteen years and has been prosecuting these habeas proceedings since April 3, 1979. The appeal was inordinately delayed by extensions of time granted for the filing of the State's briefings. In light of these circumstances, we deem that judicial expediency and the furtherance of justice demand that we meet the issue and make a disposition now.

We believe the court at trial arbitrarily adhered to its prior rulings on the motion *in limine* and the voir dire restriction in rejecting the testimony of three defense witnesses then before the court.

Parisie's offer of proof consisted of defense counsel's statement to the trial court that a witness would testify to having participated in three homosexual acts with the decedent and that the decedent was reputed in the community to be a homosexual. Also, defense counsel referred the trial court to an affidavit executed by another defense counsel and previously filed with the court and referred to at the hearings on the motion *in limine* and voir dire restrictions. This affidavit stated that two witnesses had seen the decedent in known male homosexual locations making homosexual manifestations.

The State does not dispute that the proffered testimony of the three witnesses was relevant, material and crucial to Parisie's defense. Rather, it attempts to justify the exclusionary ruling on the ground that the form of Parisie's offer of proof was defective; the state claims that defense counsel should have presented the testimony of the witnesses *in camera* rather than make the

offer of proof himself. We believe that a prosecutor should not play cat and mouse with Sixth Amendment rights.

The same offer of proof had been made to the trial court on two prior occasions. On neither of those two occasions did the State's counsel challenge the offer on the grounds of form. It is manifest that State's counsel fully understood the nature of the testimony sought. But, if the State's counsel was not satisfied with the offer made through defense counsel's statement or wished further advice as to the witnesses' qualifications or to the substance of the proffered testimony, he should have asked, and was required to ask, for the testimony of the witnesses to be proffered *in camera*. Furthermore, the trial court well understood the importance of the testimony both at the time of its ruling on the motion *in limine*, and again when it denied defense counsel's motion for reconsideration of the ruling on the voir dire restriction. We assume the trial court still had that understanding when it excluded the witnesses' testimony. *See Schusler v. Fletcher*, 74 Ill. App. 2d 249, 219 N.E.2d 588, 590 (1966).

For the reasons later stated, we respectively disagree with the conclusion of the appellate court of Illinois, Fourth District, 287 N.E.2d at 325, that "[t]he 'offer of proof' regarding all three of these witnesses is patently inadequate. They amount to nothing more than conclusionary, broad-sweeping statements of defense counsel and offer no acceptable foundation for admission as reputation evidence." The showing made simply does not warrant such a low assessment of probative value.

The proffered testimony of the three witnesses involved a great deal more than mere reputation evidence. The testimony involved actual homosexual acts and manifestations on the part of the decedent.

Sixth Amendment guarantees are very demanding in the protection of the right to a fair trial on murder charges. There is no indication in the record before us that the trial court ever made a definitive ruling that Parisie's counsel's offer of proof was insufficient. We are

satisfied that the trial court and the State's counsel were well advised as to the content, competency, and relevancy of the proffered testimony of the three witnesses then standing before the court. The taking of their testimony *in camera* may well have been merely a rehearsal, supplying no additional insight to the trial court.

To face Parisie at the appellate level with the State's position that the offer of proof was technically insufficient raises an issue never urged at trial and never decided by the trial court. Rules on offers of proof are geared to the principle of preliminary advice to the trial court as to the relevancy of proffered evidence in order for the trial court to properly rule on admissibility, a safeguard against the admission of irrelevant and prejudicial evidence. At Parisie's trial, the trial court was well and fully advised as to the relevancy of the proffered evidence since the early stages of the trial. Refer to the trial court's ruling on the motion *in limine* and the trial court's voir dire ruling on the second day of trial above. The prejudice to Parisie from the restrictive voir dire ruling destroyed Parisie's defense predicated upon the testimony of the two expert witnesses. The late enforcement of a technical defect in the offer of proof at the appellate level must be rejected as in conflict with Parisie's overriding due process rights under the Fourteenth Amendment. *Green v. Georgia*, 442 U.S. 95, 97 (1979).

In *Washington v. Texas*, 388 U.S. 14 (1967), the Supreme Court, in reversing a conviction when a defense witness was precluded from testifying, stated:

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19. *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.")

We are convinced in this case that the ruling excluding the proffered testimony was a carryover of the ill-advised orders on the motion *in limine* and the voir dire restriction. As such, the ruling was abusive and arbitrary. *Hughes v. Mathews*, 576 F.2d 1250, 1256 (7th Cir.), *cert. denied*, 439 U.S. 801 (1978), *quoting Washington v. Texas*, 388 U.S. at 25 (Harlan, J., concurring).

Parisie's defense to the murder charge was that he did not have the requisite intent or mental capacity at the time of the incident because he was undergoing a "homosexual panic," a state of mind in which an individual acts instinctively or, in the words of the defense psychologist, becomes "insane for a period of time." The State is correct in asserting that the Supreme Court of Illinois has held that homosexuality "has in no way been equated in the law with insanity or incompetency." *People v. Jones*, 43 Ill.2d 113, 251 N.E.2d 195, 199 (1969); *People v. Jones*, 6 Ill.2d 252, 128 N.E.2d 739 (1955).

Such a holding of law, however, does not address a disturbed state of mind resulting from manifestations of homosexual orientation. The Illinois courts did not reach the issue of whether the psychotic state of mind caused by "homosexual panic" is a limitation or impairment of the requirement of mental capacity to commit a crime. Nor do we reach that issue here.[3]

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[3] The court in State v. Thornton, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975), described homosexual panic "as a violent emotional reaction to a homosexual situation stemming from a person's conscious, or subconscious, awareness of his own homosexual tendencies and a desire to conceal them at any cost. The result . . . is conduct resulting in 'fright, flight or fight', and a loss of ability to distinguish between right and wrong and the suspension of premeditation or willful intent." *See also* Commonwealth v. Shelley, 374 Mass. 466 (1978).

Parisie testified in his own defense, stating that as he walked along a Springfield street at about 9:00 p.m. on April 12, 1968, Jackson pulled up next to him and offered him a lift. Parisie knew Jackson because they had once talked about sports cars at Jackson's automobile dealership, and accepted the offer of a ride.

Jackson soon stopped, purchased gasoline, paid cash from a large roll of bills, and after driving around the streets, he drove to a secluded gravel road and stopped in a driveway. He turned off the car lights, moved in the front seat toward Parisie, and put his hand on Parisie's crotch and said: "John, I'd like to blow you."

To a question by defense counsel, Parisie replied:

> Well, I was mad and he was smiling and he said, well if he couldn't I was going to walk; and that's where it ended right there. I remember struggling. I just kind of blew up, went crazy. I don't remember exactly or in anyway anything that happened after that, except we were struggling and I remember driving in circles in his car and—there just wasn't anything to it, nothing I can pinpoint or tell you direct.

A court-appointed clinical psychologist who examined Parisie found him to be a highly delusional paranoid schizophrenic who was a loner with a basic distrust of people and who suppressed his emotions causing periodical blow-ups. He found Parisie to be a highly latent homosexual with strong feelings of inferiority and testified that a severe stress of any type could result in an acute schizophrenic reaction with accompanying amnesia. During this schizophrenic reaction, "the individual comes apart and becomes insane for a period of time."

A court-appointed psychiatrist defined homosexual panic as a fear reaction precipitated by a psychological trauma such as a homosexual advance. In such circumstances, the person, because of his own repressed homosexual feelings, loses control and acts purely instinctively, "almost like an animal," causing the person to be unable to control the nature of his acts. This psychologi-

cal state is followed by a "disassociative reaction of the personality" whereby the personality "literally disintegrates or becomes grossly disorganized." The most common manifestation of a disassociative act is amnesia brought on because the individual cannot consciously tolerate his feelings and the acts in which he engaged because of those feelings. Homosexual panic, the psychiatrist stated, is a mental defect and symptomatic of a mental disease.

The two critical elements of the defense experts' concept of the state of mind referred to as "homosexual panic" are: (1) Latent homosexuality on the part of the individual; and (2) A triggering act by another homosexual "such as a homosexual advance" or offer. While these defense expert witnesses supplied opinion evidence as to the existence of Parisie's latent homosexuality, the trial court's exclusionary ruling left the jury with the testimony of Parisie, an admitted latent homosexual, as the only evidence of homosexuality on the part of the deceased, a well known and respected citizen of the community, and of the second factor—a triggering act. The exclusion of the proffered testimony of the three witnesses deprived Parisie's defense of vital corroborative evidence, both as to his credibility and the deceased's homosexuality. *See McMorris v. Israel*, 643 F.2d 458, 461-62 (7th Cir. 1981).

> Where credibility is as critical as in the instant case, the circumstances are such as to make the [excluded] evidence materially exculpatory within the meaning of the Constitution.

Id. at 462.

Of course, Parisie's credibility and the factual defense, under appropriate instructions as to the applicable law, are matters committed to the sole province of the jury. However, during their consideration of those matters, the defendant is entitled under the Sixth Amendment to have the entire defense picture before the jury and not just one-half of the picture, namely, Parisie's account of the deceased's homosexual advance.

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. at 19. *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense").

The trial court's ruling excluding the testimony of the three witnesses standing by was reversible error.

Issue 1(a):

In view of our ultimate reversal and granting of a new trial, this issue is moot on this appeal.

Issue 1(b):

In the event of a new trial, this opinion should be ample advice on the subject of the issue.

Issue 3:

In view of the probability of a new trial, we expect that the State will not again indulge in clearly or tenuously erroneous questioning with reference to the polygraph test, the decedent's widow and young children or display of the bloody mutilated clothes. *See People v. Parisie*, 7 Ill.App.3d 1009, 287 N.E.2d 310 (1972).

Issue 4:

In view of the order for a new trial, this issue is moot.

Issue 5:

We are convinced from our reading of the record before us that in the absence of reversible error under issue 2, the exclusion of the testimony of the three proffered witnesses, any one or perhaps two of the erroneous

rulings under issue 1(b) (voir dire restriction) or issue 3 (prosecutor's improper tactics) could be considered harmless and not prejudicial to a fair trial; however, when those errors are considered cumulatively, the resulting aggregating effect was a steady and increasing destruction of a constitutional due process version of a fair trial.

We conclude for that reason alone Parisie would be entitled to a new trial.

The summary judgment entered by the District Court on December 18, 1979 is reversed and the cause is remanded to the District Court with instructions to issue its writ of habeas corpus as prayed for in Parisie's petition, or in such substance as the District Court shall determine, but to stay the execution of such writ on the condition that the State of Illinois grant Parisie a new trial on the charges resulting in his conviction and sentence within a reasonable time or such a definite time as fixed by the District Court, and diligently and without unreasonable delay prosecute the charges to final conclusion. Otherwise, execution of the writ shall be forthwith had.

REVERSED AND REMANDED.

CUDAHY, *Circuit Judge*, Dissenting in Part:

The majority opinion is based fundamentally on premises which may well be quite valid. My objection is to the majority's disposition of the case without, I think, adequate exploration of these premises and their ramifications.

The majority concludes that the Illinois trial court deprived Parisie of his right to present competent and relevant testimony in his defense, and, therefore, deprived him of due process, by excluding the testimony of three witnesses concerning the alleged homosexual proclivities of the victim. Because the federal district court apparently failed to consider the issue of homosexuality at all and because the proffered testimony was

apparently rejected by the Illinois trial court for procedural reasons, I would remand the case to the district court for further proceedings before now reaching the constitutional issue as the majority perceives it.[1] The majority concedes that remand would ordinarily be the better practice, but concludes that "judicial expediency" and the "furtherance of justice" suggest disposition without remand.

I.

The majority contends that "[t]he State does not dispute that the proffered testimony of the three witnesses was relevant, material and crucial to Parisie's defense. Rather, it attempts to justify the exclusionary ruling on the ground that the form of Parisie's offer of proof was defective . . . ." *Ante*, at 6. To the contrary, the State objected to Parisie's offer of proof presumably because the offer arguably failed to demonstrate the reliability (as well as the relevancy) of this evidence in establishing the victim's *reputation* as a homosexual.[2] Relevant evidence is evidence that tends to prove a fact or matter in controversy more or less probable as tested in the light

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[1] I limit my comments to the alleged due process violation since the majority finds this issue dispositive of this appeal.

[2] The majority may be disputing this thesis, arguing that the proffered testimony "involved a great deal more than mere reputation evidence" because the witnesses allegedly would testify about "actual homosexual acts and manifestations" attributed to the victim. *Ante*, at 7. But I think under Illinois law evidence of prior homosexual acts may not be admitted to prove reputation. *See People v. Moretti*, 6 Ill. 2d 494, 129 N.E. 2d 709, 725-26 (1955), *cert. denied*, 356 U.S. 947 (1958). The defendant apparently did not articulate at trial or on this or prior appeals any basis other than reputation upon which the state trial judge could have admitted evidence of prior acts by the victim. Rather than joining the majority in merely asserting that the proffered evidence "involved a great deal more than reputation evidence," I believe that we should remand to the district court for a determination of the purpose for which this evidence was proffered and the state law evidentiary rules governing its admission.

of accepted assumptions about human behavior. *Marut v. Costello*, 34 Ill. 2d 125, 214 N.E.2d 768 (1965). Illinois traditionally has accorded its courts broad discretion in determining the relevancy of evidence. *See Foss Park District v. First National Bank of Waukegan*, 125 Ill. App. 2d 276, 260 N.E.2d 474 (1970), *cert. denied*, 402 U.S. 907 (1971). In this case, the trial court apparently determined that the offer of proof did not establish the relevancy of the proffered evidence since, *inter alia*, the proffered evidence seemingly did not clearly relate to homosexual *reputation*.

Parisie's contention was also considered by the Illinois Appellate Court upon the direct appeal of his conviction. The Appellate Court determined, as a matter of state law, that Parisie's proffer failed to demonstrate the relevancy of the proffered evidence to the victim's homosexual reputation:

> The "offer of proof" regarding all three of these witnesses is patently inadequate. They amount to nothing more than conclusionary, broad-sweeping statements of defense counsel and offer no acceptable foundation for admission as reputation evidence. "This court, on numerous occasions, has held that reputation witnesses must be shown to have adequate knowledge of the person queried about and that evidence of reputation, to be admissible, must be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness." *People v. Moretti*, 6 Ill.2d 494, 129 N.E.2d 709, 725. Obviously, the form in which this offer of proof comes to us is insufficient to accommodate the well settled state of the law in this area.

People v. Parisie, 7 Ill. App. 3d 1009, 287 N.E.2d 310, 325 (1972). The majority, however, would discard Illinois' purported application of its own law governing the procedure for admission of evidence because "[t]he showing made [by defendant] simply does not warrant such a low assessment of probative value," *ante*, at 7, and the ruling excluding the evidence was "abusive and

arbitrary." *Ante*, at 9. Although I share the view of the majority that the alleged homosexuality of the victim was in all likelihood a material issue in the case, which the defendant may have been denied an opportunity to pursue, I think we should not so summarily override the state's procedural determination as to the relevancy and competency of evidence.

II.

The appropriate analysis for determining the validity of a state procedural rule which, when applied, precludes the admission of evidence necessary for a defense is set out in *Chambers v. Mississippi*, 410 U.S. 284 (1973).[3] *See McMorris v. Israel*, 643 F.2d 458 (7th Cir. 1981). In *Chambers*, the defendant had called to the stand a witness who had admitted in an out-of-court confession that he, not the defendant, committed the murder. After the state elicited a repudiation of the confession on cross-examination, the trial court, by applying the state's rules on voucher (or "party witness") and hearsay evidence, refused to allow the defendant to question this witness adversely (or to call certain other witnesses). On appeal, the defendant alleged that the state's application of these evidentiary rules denied him his right of confrontation and precluded a fair trial. The Court did not, however, summarily conclude that the state's application of these rules violated the defendant's rights. The Court instead said that the defendant's rights may "bow to accommodate other legitimate interests in the criminal process." 410 U.S. at 295. In applying this principle, the *Chambers* Court closely examined the competing interests underlying the state rules and the constitutional policies, and eventually concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, [a state evidentiary rule] may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

[3] This analysis was most recently applied in *Green v. Georgia*, 442 U.S. 95 (1979).

In the instant case, the majority has not attempted to analyze whether the policies underlying Illinois' requirements (as to offers of proof of reputation) for appraising the relevancy of evidence are outweighed in this case by Parisie's Sixth Amendment right, through the evidence available, to present a defense of homosexual panic. The majority merely notes that in *its* opinion, the proffered evidence was relevant to establish the victim's homosexuality.[4] This does not, however, seem to be the analysis mandated by *Chambers*.[5] Moreover, the majority reaches its conclusion notwithstanding that the district court, whether "through oversight or other reasons," failed entirely to address the homosexuality issue. *Ante*, at 7.[6]

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[4] I note too that the trial court was aware that of the three witnesses Parisie wished to call to the stand, one would admit to having homosexual relations with the victim for pay, while the other two would testify to observing the victim evincing manifestations of homosexuality at various homosexual "hangouts."

[5] The majority cites *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir.), *cert. denied*, 439 U.S. 801 (1978), apparently for the proposition that the state trial court's ruling was arbitrary and thus, constitutionally infirm. *Hughes*, however, is not on all fours with the instant case. In *Hughes*, this court invalidated a state rule excluding relevant and competent evidence because of its facial unconstitutionality. The instant case does not involve a challenge to facial constitutionality but instead raises the question whether the Illinois rule, *as applied* to the facts of this case, deprived Parisie of his constitutional rights by excluding this testimony. *See McMorris v. Israel*, 643 F.2d 458, 461 n.5 (7th Cir. 1981). The most appropriate analysis in the latter type of case is provided by *Chambers*.

The majority also relies on *Washington v. Texas*, 388 U.S. 14 (1967), a case similar to *Hughes*. In *Washington*, the Court invalidated a Texas statute as arbitrary and irrational on its face. That decision did not, as the language quoted by the majority might seem to imply, establish an unconditional right to present evidence without regard to state procedural rules.

[6] The majority justifies its result in part by asserting that the technical deficiency of the offer of proof was never raised

(Footnote continued on following page)

I believe the factual record before us is inadequate to assess the precise nature of the proffered testimony and the policies supporting the state's procedural rules governing offers of proof and the need for showing reputation. I would, therefore, remand this case to the district court for an expeditious but detailed review of the state court record and for an evidentiary hearing consistent with *Chambers* and with this court's recent opinion in

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[6] *continued*

during the trial. But this contention is misleading. The purpose of an offer of proof is to provide the court with sufficient information upon which to evaluate the relevancy and competency of evidence. *Ante*, at 10.

During the trial, the defendant called the three witnesses to testify about the victim's prior homosexual acts and manifestations, ostensibly to prove reputation. The state objected on grounds of relevancy to permitting the witnesses to testify, and the court sustained the state's objections. The defendant thereafter made the offers of proof which are at issue here. The defendant, however, never again renewed his request to the trial court to permit the witnesses to testify. But on appeal, in the Illinois Appellate Court, the defendant challenged the trial court's ruling excluding this evidence. I believe that the appellate court was entitled, as had been the trial court, to evaluate the offers of proof to determine their sufficiency to demonstrate the relevancy of the evidence. The trial court was not delinquent in apparently failing to decide the precise question of sufficiency of the offers of proof since this precise issue was not pressed before it. Nor was the state delinquent in failing to press this precise question. Moreover, the arguable relevancy of the proffered evidence may not have been obvious to the trial court, as the majority seems to assert. The trial court record, at least up to and at the time these offers of proof were made, reflects some confusion about the theory of "homosexual panic," upon which the defendant claims to rely; and it was not clear whether it was this theory or a more general claim of insanity, upon which the defendant relied.

McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981).[7] On remand I think Circuit Rule 18 should apply.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] The majority also notes that the trial court's ruling excluding defendant's evidence "was a carryover of the ill-advised orders on the motion *in limine* and the voir dire restriction." Although I also have difficulty understanding why the trial court restricted voir dire and am in doubt as to the propriety of the *in limine* motion, I find that again the district court and the majority have failed to consider these rulings under a *Chambers*-type analysis. Thus, on remand the district court should assess these issues under Illinois law as well as under the Constitution to determine if the voir dire ruling and motion *in limine* deprived the defendant of due process.

One facet of the voir dire analysis *might* involve whether the defendant would have been prejudiced by inclusion on the jury of persons antagonistic to homosexuals (in light of the *victim's* alleged proclivities).

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 80-1940

August 14, 1980

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL JR., Circuit Judge

JOHN STEPHAN PARISIE,
Petitioner-Appellant,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. 79-C-2113
James L. Foreman, Judge

This matter comes before the court for its consideration upon the filing herein on the following documents:

(1) The "MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION" filed herein on July 18, 1980 by counsel for the respondent-appellee,

(2) The "MOTION TO DISMISS RESPONDENT-APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION" filed herein on July 23, 1980 by counsel for the petitioner-appellant. This Court has thoroughly reviewed the aforesaid documents. On consideration thereof,

IT IS ORDERED that the respondent-appellee's "MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION" is hereby DENIED.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
[Filed July 23, 1980]

JOHN STEPHAN PARISIE,
Petitioner-Appellant,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent-Appellee.

NO. 80-1940

MOTION TO DISMISS RESPONDENT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

Now comes the Petitioner-Appellant, JOHN STEPHAN PARISIE, *pro se*, before this Honorable Court and moves this Honorable Court to dismiss the Respondent's Motion to Dismiss for Want of Jurisdiction in the above-entitled case.

In support of this motion, the Petitioner-Appellant states as follows:

1. The Petitioner-Appellant, a ward of the Illinois Department of Corrections since April 1968, is currently confined at the Menard Correctional Center, Menard, Illinois.

2. On April 3, 1979 Petitioner-Appellant filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 et seq., with the United States District Court for the Southern District of Illinois.

3. On December 18, 1979 District Court Judge James Foreman issued an order granting a motion for Summary Judgment which had been submitted by the Respondent.

4. On January 3, 1980 Petitioner-Appellant filed a motion for an Extension of Time to File a Motion for Reconsideration of an Order with the United States District Court for the Southern District of Illinois.

5. On February 1, 1980 Petitioner-Appellant filed a motion for Reconsideration of an Order with Supporting Memorandum at Law with the United States District Court for the Southern District of Illinois.

6. On May 8, 1980 District Court Judge James Foreman issued an order denying Petitioner-Appellant's motion for reconsideration.

7. On June 2, 1980 Petitioner-Appellant filed a Notice of Appeal, motion for Leave to Appeal *in forma pauperis*, motion for Leave to Proceed *in forma pauperis* with Affidavit of Poverty, and motion for Appointment of Counsel with the United States District Court for the Southern District of Illinois.

8. On June 26, 1980 District Court Judge James Foreman found the Petitioner-Appellant's appeal to be taken in good faith and issued a certificate of probable cause. Also, Petitioner-Appellant was granted leave to proceed *in forma pauperis*.

9. The Respondent contends that the Petitioner-Appellant's appeal should be dismissed pursuant to Rule 59 of the Federal Rules of Civil Procedure because the Petitioner-Appellant failed to motion for reconsideration of an order within ten (10) days of the entry granting the Respondent's motion for Summary Judgment. In addition, the Respondent contends that even if the motion for reconsideration were timely filed, the District Court would have had no jurisdiction in accordance with Rule 59 of the Federal Rules of Civil Procedure.

10. The United States District Court for the Southern District of Illinois issued an order granting the Respondent's motion for Summary Judgment on December 18, 1979. The Petitioner-Appellant, proceeding as a pro se, indigent claimant could not possibly have filed a motion for Reconsideration of an Order within any ten (10) day time limit. The petition for a writ of habeas

corpus contained fourteen (14) detailed allegations. Following the granting of Summary Judgment in favor of the Respondent, Petitioner-Appellant was required to research his motion for Reconsideration of an Order through the Menard Prison Law Library, prepare and type the motion, then have the motion notarized by a member of the Menard Correctional Center staff. In addition, the Petitioner-Appellant made an attempt to procure affidavits from both trial counsel for the defense as well as each of the members of the trial jury. Finally, this Honorable Court should note that notary access as well as access to the Menard Prison Law Library is not immediate. Access to each involves submitting a formal request form. When enough inmates have submitted requests, the library staff and the institutional Record Office (notary) will prepare a "call-line" and handle the needs of approximately a dozen inmates at one time. Petitioner-Appellant was expected to complete this entire process within a period of ten (10) days. It was impossible from a practical viewpoint under normal circumstances . . . and this process was made even more difficult because of the seasonal holidays in which the Law Library was closed, and no notary requests were honored until after January 1, 1980.

11. Petitioner-Appellant contends that although the United States District Court for the Southern District of Illinois never ruled on the Petitioner-Appellant's motion for an extension of time, the motion was filed. More importantly, the District Court accepted the motion for Reconsideration of an Order and, subsequently, denied the motion on May 8, 1980. It is important to note that the motion was denied, in effect, because the District Court felt the allegations made consisted of a reiteration of material stated in the original habeas corpus petition . . . the motion was not denied because it was not timely filed.

12. Petitioner-Appellant contends that he believes that only final orders from a District Court are allowed to be appealed and, as such, believed the denial of the motion for Reconsideration of an Order to be the Dis-

trict Court's final order. In accordance with that belief, his Notice of Appeal and subsequent motions were timely filed on June 2, 1980 . . . well within the thirty (30) days time limit following the entry of a final judgment.

13. Petitioner-Appellant asks that this Honorable Court note that the Respondent made no attempt to contest the filing of the motion for Extension of Time, and no attempt to contest the motion for Reconsideration of an Order until July 16, 1980 . . . a full six (6) months since the former motion was filed with the United States District Court for the Southern District of Illinois. In addition, the Respondent believes Petitioner-Appellant's Notice of Appeal was due on or about January 18, 1980 which would have been thirty (30) days from the District Court's order granting Summary Judgment in favor of the Respondent. Yet six (6) months later the Respondent is asking this Honorable Court to dismiss Petitioner-Appellant's appeal because it should have been filed in mid-January. If there is substance to the Respondent's allegations, then Petitioner-Appellant does not understand why Respondent waited six months to file his motion to dismiss when the same motion could have been filed in the United States District Court for the Southern District of Illinois January past. Nowhere in his motion to dismiss does the Respondent explain why the Petitioner-Appellant was allowed to proceed in the District Court without having the proceedings contested. Nowhere does the Respondent, in his motion to dismiss, state why he has waited six (6) months to present his allegations.

14. Petitioner-Appellant states that he twice asked the United States District Court for the Southern District of Illinois to appoint counsel to represent him in the Habeas Corpus proceedings. The initial motion for the Appointment of Counsel filed in April 1979 was never ruled on, and a second motion filed on June 2, 1980 was denied on the basis of it being improper for the District Court to grant at that time. Petitioner-Appellant contends that he is a layman with no legal

training of any kind, and is completely unversed in the science of jurisprudence. The allegations, all fourteen (14) of them, originally raised in the habeas corpus proceeding are complicated and should have warranted the appointment of counsel to assist the Petitioner-Appellant in determining all of the "crucial elements" involved as well as assuring the Court that the Federal Rules of Civil Procedure would have been properly adhered to. In no way have the Federal Rules of Civil Procedure been abrogated or otherwise abused due to any culpable negligence on the part of the Petitioner-Appellant. Finally, Petitioner-Appellant currently has a motion for the Appointment of Counsel pending before this Honorable Court outlining the need for the assistance of counsel . . . a need expressed by the Petitioner-Appellant since his initial filing on April 3, 1979.

15. Petitioner-Appellant contends that even though the decision in *Haines v. Kerner*, 404 U.S. 519 (1972) concerns prisoners' pro se §1983 complaints, Petitioner-Appellant cannot be held to the same strict standards required of lawyers. Petitioner-Appellant contends that his proceedings should be read liberally, especially in view of the fact the Petitioner-Appellant has made no overt attempt to abuse or otherwise delay or impede his proceedings before this Honorable Court or before the United States District Court for the Southern District of Illinois.

WHEREFORE, for the aforementioned stated reasons, the Petitioner-Appellant moves this Honorable Court to dismiss the Respondent's motion to dismiss this appeal for want of jurisdiction.

Respectfully Submitted,

/s/ JOHN STEPHAN PARISIE C-10246
Menard Correctional Center
P.O. Box 711
Menard, IL 62259

Petitioner-Appellant, Pro Se

Dated: July 21, 1980.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

JOHN STEPHAN PARISIE,
Petitioner-Appellant,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent-Appellee.

NO. 80-1940

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION

Respondent, by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, moves this Court to dismiss the appeal filed in the above entitled cause for want of jurisdiction and in support thereof states as follows:

1. Petitioner is an inmate at Menard Correctional Institution in Menard, Illinois. He filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 with the United States District Court, Southern Division. On December 18, 1979 in that action Judge Foreman granted a Motion for Summary Judgment which had been made by the respondent.

2. On January 3, 1980 the petitioner filed with the United States District Court a Motion For Extension Of Time To File A Motion For Reconsideration Of An Order. This motion was never acted upon by the Court. On February 1, 1980 petitioner filed a Motion For Reconsideration Of An Order With Supporting Memorandum At Law and a Notice of Appeal. Petitioner's Motion For Reconsideration Of An Order With Supporting Memorandum Of Law was denied on May 8, 1980. On June 2, 1980 petitioner filed another Notice of Appeal which the

United States District Court issued a certificate of probable cause for on June 26, 1980.

3. Rule 59 of the Federal Rules of Civil Procedure mandates that motions to alter or amend judgments be served not later than ten (10) days after the entry of the judgment. In *Bowder v. Director Department of Corrections of Illinois*, 98 S.Ct. 556 (1978) the United States Supreme Court indicated in footnote 5 that "Rule 6(b) prohibits enlargement of the time period prescribed in all of these rules." Consequently, petitioner's Motion for Extension Of Time to File A Motion For Reconsideration Of An Order and his Motion For Reconsideration Of An Order With Supporting Memorandum At Law were not timely filed with the District Court as they were filed more than ten (10) days after that Court's December 18, 1979 order. Indeed, had petitioner's request for an extension of time been filed within the proper ten day framework the District Court would still not have had the jurisdiction to grant it as such a time period cannot be enlarged under *Bowder v. Director Department of Corrections of Illinois, supra.*

4. Rule 4a of the Federal Rules of Appellate Procedure require an appeal to be taken within 30 days after the entry of a judgment. Petitioner first filed a Notice of Appeal in the instant case 44 days after the December 18, 1979 district court's order. When the petitioner filed his Notice of Appeal on February 1, 1980 he made no showing of excusable neglect for his late filing. The district court has not addressed itself to the February 1 filing but has issued a certificate of probable cause for the Notice of Appeal filed by the petitioner on June 2, 1980 — a full six months after the district court's judgment. Presumably, the Notice of Appeal filed on June 2, 1980 was certified by the district court because petitioner's Motion For Reconsideration Of An Order With Supporting Memorandum Of Law had been recently denied but as that motion had not been filed in a timely fashion it could not serve to toll the running of the 30 day time

period required by Rule 4a. See: *Bowder v. Director Department of Corrections of Illinois, supra.* Neither of the notices of appeal filed by the petitioner were timely and the district court lacked jurisdiction to certify either one of them for an appeal.

WHEREFORE, for the above stated reasons, respondent moves this Court to dismiss this appeal for want of jurisdiction.

Respectfully submitted,
WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Susan Sutherland
SUSAN SUTHERLAND
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-1090

Served: July 16, 1980

APPENDIX K

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN STEPHAN PARISIE,
Petitioner,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.

An Appeal from the Judgment of the United States District Court for the Southern District of Illinois under Civil No. 79-2113-B
The Honorable James L. Foreman
Judge Presiding

NOTICE OF APPEAL

NOTICE is hereby given that JOHN STEPHAN PARISIE, Petitioner, appeals to the United States Court of Appeals for the Seventh Circuit from the Judgments/Orders of the United States District Court for the Southern District of Illinois entered on December 18, 1979 and May 8, 1980 in the above-captioned cause.

Respectfully Submitted,
/s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se
Menard Correctional Center
P.O. Box 711
Menard, IL 62259

Dated: May 23, 1980.

APPENDIX L

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
ex rel. JOHN STEPHAN PARISIE,
Petitioner,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.
} CIVIL NO. 79-2113-B

ORDER

FOREMAN, Chief Judge:

Before the Court is the Motion for Reconsideration of this Court's order of December 18, 1979. Apparently, it is the petitioner's contention that he is entitled to relief either under Rule 59 or Rule 60. This Court has carefully reviewed the record in this matter and finds no error with its order of December 18, 1979. Further, there appear no grounds under Rule 59 or Rule 60 for relief from that order. The Motion to Reconsider has merely reiterated the argument raised in the initial complaint in this matter. The Court finds no merit in the Motion to Reconsider, and, therefore, DENIES the motion.

IT IS SO ORDERED.

DATED: May 8, 1980

/s/ James L. Foreman
CHIEF JUDGE

APPENDIX M

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, ex rel. JOHN STEPHAN PARISIE, Petitioner, vs. J. W. GREER, Warden Menard Correctional Center, Respondent.	CIVIL NO. 79-2113-B

MOTION FOR RECONSIDERATION OF AN ORDER WITH SUPPORTING MEMORANDUM AT LAW

NOTICE AND PROOF OF SERVICE

Now comes the Petitioner, John Stephan Parisie, pro se, before this Honorable Court pursuant to Rule 60 of the Federal Rules of Civil Procedure, and moves this Honorable Court to reconsider its Order of December 18, 1979 which granted the Respondent's Motion For Summary Judgment in the above-captioned cause.

IN SUPPORT THEREOF PETITIONER STATES AS FOLLOWS:

1. That the Petitioner filed his petition for a Writ of Habeas Corpus with this Court pursuant to Title 28 U.S.C., Section 2254 et seq., on the grounds that his constitutional rights as guaranteed by the United States Constitution had been denied/violated by the Circuit Court of Sangamon County, Illinois under Indictment Number 1456-68 of that Court.

2. That this Court erred in denying the Petitioner's claim of an *Illegal Search and Seizure* under the Fourth Amendment in that the Sangamon County police performed an illegal search and seizure by entering the Petitioner's hotel room without a

search warrant and seized property that was later used as evidence at the Petitioner's trial. After reviewing the transcripts of the State trial court, this Court stated that the trial judge heard the testimony of ten (10) witnesses and arguments of both counsel. A review of the same records will show that the State trial judge heard the testimony of only four (4) witnesses: two (2) were the police officers who conducted the search and testified that they did, in fact, not have a warrant; one (1) witness was the hotel proprietor who testified that she "assumed" the Petitioner had checked out despite his rent having been paid in advance through the following day; one (1) witness was the Petitioner who testified that he had not checked out. Argument of both counsel was heard. The trial judge denied Petitioner's Motion To Suppress, and the State Appellate Court later affirmed this denial.

3. That this Court erred in denying the Petitioner's claim of a violation of his right to a *Fair and Impartial Trial* under the Sixth Amendment. This issue concerns the *Remarks of a Prospective Juror* during the voir dire before eight (8) empaneled jurors. This Court states that this prospective juror's reference to the petitioner as a "habitual criminal" had to do with a trial on which she sat as a juror fifteen (15) years earlier. This information is in error. This prospective juror informed the Court during the voir dire that she could not render a "fair and impartial verdict" because she taught the children of the deceased, and she pointed to the Petitioner and called him an "habitual criminal." This prospective juror was a young woman, and undoubtedly was a minor fifteen years earlier; ergo, not of legal age for jury duty. Defense Motion for Mistrial was denied. This young woman also stated she was biased by her friendship with one of the expert witnesses.

4. That this Court erred in denying the Petitioner's claim of a violation of his right to a *Fair and Impartial Trial* under the Sixth Amendment. This issue concerns the *Conduct of the Prosecutor* before the jury. The transcripts of the proceedings

will reflect that the trial judge had ordered that the blood-stained clothing of the deceased was not to be displayed before the jury in an effort to avoid prejudice. Further review will show that the prosecutor disregarded the order of the Court and deliberately showed the blood-stained clothing of the deceased in an attempt to inflame the jury.

Further review will show that the conduct of the prosecutor before the jury during closing argument was unprofessional and highly inflammatory. While making his closing argument, prosecutor picked up the pistol alleged to have been used in the offense, and before the jury he made an attempt to show the alignment of the bullet holes relative to the blood-stained clothing of the deceased. For reasons unknown to the Petitioner, trial counsel did not object. It is the Petitioner's feeling that this lack of effective legal representation partially support his claim of ineffective assistance of counsel. As the prosecutor concluded his argument, he paced anxiously back and forth before the jury and stated, "if you turn Parisie loose he will kill again, and again, and again." Each application of the word "again" was amplified by his having pulled the triggering mechanism on the pistol. On the whole the Court was stunned and silent. It is then the prosecutor turned and pointed the pistol at the defense table. Defense counsel Kasten told the prosecutor not to point the gun at him, and the prosecutor replied "I'm not pointing it at you, Walter." The inference being he was pointing it at the Petitioner. Defense counsel did not object to the prosecutor's blatant attempt to inflame the jury. This conduct is clearly plain error regardless of the fact inexperienced defense counsel made no objection.

5. That this Court erred in denying the Petitioner's claim of a violation of his right to a *Fair and Impartial Trial* under the Sixth Amendment. This issue concerns the *Remarks in Jury Deliberation*. In effect, a Juvenile Court Judge yelled "sock it to him, sock it to him" to the jury during the Petitioner's trial. At a post-trial hearing, the record will reflect that this judge made

such remarks. He testified that he said the above quote, but stated that he didn't intend prejudice. If prejudice was not the intent, then what was the purpose of such remarks? The Petitioner offers no affidavits supporting improper influence upon the jury because the Petitioner is a layman, untrained in legal practice, and has no legal representation. In addition, for reasons unknown to the Petitioner, trial counsel made no attempt to secure supporting affidavits.

6. That this Court erred in denying the Petitioner's claim of a violation of his right to the guarantees of the Fifth and Fourteenth Amendments concerning the Miranda Ruling. The Court states that there is some question as to what the arresting officer testified to at the preliminary hearing. A review of the questioning of the officer during the preliminary hearing will resolve the confusion. The officer, William Gribble, testified that he did not read the Miranda card to the defendant and that he did not advise the defendant of his rights under Miranda. At the time counsel for the defendant was Mark Rabin. A year later, approximately, this same officer testified under oath that he read in detail the Miranda card to the defendant upon the defendant's arrest. Defense counsel chose to impeach, but the trial court refused to make the preliminary hearing a part of the Court's own record. The error is compounded in that the arresting officer was guilty of perjury, and that guilt would have been proved had the Court reviewed it's [sic] own records — those being the record of the preliminary hearing when the arresting officer was cross-examined by defense attorney Mark Rabin. This Court erred in taking the officer's statements at pretrial as clarification of the issue.

7. That this Court erred in denying the Petitioner's claim of a violation of his right to *Effective Assistance of Counsel* under the Sixth Amendment. This Court erred in stating that defense attorney Robert E. Gillespie motioned to withdraw from the case and stated that he had a "heavy trial practice." The record will reflect that the motion to withdraw was filed by Mark

Rabin, petitioner's initial counsel. Rabin withdrew immediately after the preliminary hearing. Petitioner claims his counsel was ineffective for having failed to object to the conduct of the prosecutor during his closing argument when the prosecutor defied the Court's order not to display the bloody clothing of the deceased. Defense counsel failed to object to the conduct of the prosecutor during closing argument when the prosecutor demonstrated before the jury with the alleged weapon and stated that if "Parisie were released he would kill again, and again, and again." Each application of the word "again" was punctuated by the prosecutor's pulling of the trigger on the pistol. These actions by the prosecutor inflammed the jury, and experienced defense counsel would have objected. Defense attorney Walter H. Kasten was appointed by the Court and was at the time working as a Public Defender in Sangamon County. Several times the Petitioner asked Kasten to withdraw from the case because of Kasten's repeated attempts to get the Petitioner to plea-bargain. Kasten refused and, subsequently, Petitioner refused to discuss anything at all with Kasten relating to the case. Furthermore, Kasten was appointed to represent the Petition on a petition for Post-Conviction Relief. Petitioner petitioned the Court to remove Kasten, but request was ignored. In addition, Kasten never had any contact with Petitioner, through mail or otherwise, all throughout the Post-Conviction proceedings. The lack of communication evolved from the conflicts that arose during the original trial proceedings. The Court erred in finding the contents of Gillespie's letter dated April 4, 1979 "questionable." The fact that ten years have elapsed is immaterial in this instance. The facts surrounding my conviction are no more "questionable" just because the conviction occurred more than ten (10) years ago. Gillespie has developed into a fine corporation attorney, and he would not risk tarnishing his reputation for the sake of offering the Court "questionable" testimony as to his competency. Finally, this Court has negated points 4, in

part, because of the failure of the defense to object to the prosecutor's actions. This Court recognizes that no objections took place, and that is the core of my argument. Effective counsel would have objected.

8. This Court erred in not finding cumulative error to support Petitioner's allegations. Petitioner's Habeas Corpus alleges fourteen (14) separate constitutional violations. The attorney general responded to only seven (7) issues, not challenging the remaining seven (7) allegations. Petitioner contends that even if this Court finds that no plain error exists, cumulative error does exist, and as such Petitioner's hope is that this Court will reconsider it's Order granting Respondent's Motion For Summary Judgment.

9. This Court erred in granting the Respondent's Motion For Summary Judgment in that it is the Petitioner's understanding that summary judgment is an order by a court deciding the merits of a case on the pleadings and other uncontroverted evidence. The purpose of the motion is to achieve quick resolution when there exists no genuine issue on any material fact. However, the facts in my complaints are in dispute with some of the facts alleged in the answer to my complaint and with some of the facts proposed by this Court; thus, Petitioner feels granting of summary judgment is improper.

WHEREFORE, this Petitioner respectfully requests that this Honorable Court will reconsider its Order entered on December 18, 1979 granting the Respondent's Motion For Summary Judgment in the above-captioned cause, and grant the Petitioner an Evidentiary Hearing.

Respectfully Submitted

/s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se

Date: January 29, 1980

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, ex rel. JOHN STEPHAN PARISIE, Petitioner, vs. J. W. GREER, Warden Menard Correctional Center, Respondent.	CIVIL NO. 79-2113-B

NOTICE AND PROOF OF SERVICE

TO: Steven Teplinsky
Assistant Attorney General
State of Illinois
500 South Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that on the 29th day of January, 1980, I have filed with the Clerk of the United States District Court for the Southern District of Illinois, the original and one (1) copy of the appended MOTION FOR RECONSIDERATION OF AN ORDER WITH SUPPORTING MEMORANDUM AT LAW.

/s/ John S. Parisie
John Stephan Parisie C-10246
Menard Correctional Center
P.O. Box 711
Menard, IL 62259
Petitioner, Pro Se

The undersigned states that a true and correct copy of the appended MOTION FOR RECONSIDERATION OF AN ORDER WITH SUPPORTING MEMORANDUM AT LAW was served on the above-named person representing the Respondent in the above-captioned cause, by depositing said

copy in the United States Mail at the Menard Correctional Center, Menard Illinois on this 29th day of January, 1980.

/s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se

I, JOHN STEPHAN PARISIE, declare under penalty of perjury that the aforegoing is true and correct to the best of my knowledge and belief.

/s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se

APPENDIX N

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN STEPHAN PARISIE,
Petitioner,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.
} CIVIL NO. 79-2113-B

MOTION FOR EXTENSION OF TIME TO FILE A MOTION FOR RECONSIDERATION OF AN ORDER

Now comes the Petitioner, John Stephan Parisie, pro se, before this Honorable Court and moves this Honorable Court to enter an Order granting the Petitioner an EXTENSION OF TIME TO FILE A MOTION FOR RECONSIDERATION OF AN ORDER in the above-captioned cause.

IN SUPPORT THEREOF PETITIONER STATES AS FOLLOWS:

1. That on December 18, 1979 this Honorable Court entered an Order granting the Respondent's Motion For A Summary Judgment in the above-captioned cause.

2. That pursuant to Rule 60 of the Federal Rules of Civil Procedure, the Petitioner has 30 days in which to file his Motion For Reconsideration of an Order.

3. That the Petitioner needs an extension of time in order to prepare his Motion For Reconsideration of an Order due to the fact that the Petitioner has to obtain Affidavits to substantiate allegations made in the above-captioned cause.

4. That the Petitioner needs the extension of time through January 31, 1980 to prepare and file his Motion For Reconsideration of an Order in the above-captioned cause.

WHEREFORE, the Petitioner prays that this Honorable Court will enter an Order granting the Petitioner an Extension of Time until January 31, 1980 to file his Motion For Reconsideration of an Order in the above-captioned cause.

By /s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se

Date: 12-27-79

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN STEPHAN PARISIE,
Petitioner,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.
} CIVIL NO. 79-2113-B

NOTICE

TO: Steven Teplinsky
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that on the 27th day of December, 1979, I have filed with the Clerk of the United States District Court for the Southern District of Illinois, the original and one (1) copy of the appended Motion For Extension Of Time To File A Motion For A Reconsideration Of An Order.

/s/ John S. Parisie
John Stephan Parisie C-10246
Menard Correctional Center
P.O. Box 711
Menard, IL 62259
Petitioner, Pro Se

The undersigned states that a true and correct copy of the appended Motion For Extension Of Time To File A Motion For Reconsideration Of An Order was served on the above-named person representing the Respondent in the above-captioned cause, by depositing said copy in the United States Mail at the Menard Correctional Center, Menard, Illinois on this 27th day of December, 1979.

/s/ John S. Parisie
John Stephan Parisie,
Petitioner, Pro Se

Witnesses:
/s/ Robert Piorthowski
/s/ Thomas E. Hanes

APPENDIX O

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
ex rel, JOHN STEPHEN PARISIE,
Petitioner,
vs.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.
} CIVIL NO. 79-2113-B

ORDER

FOREMAN, Chief Judge:

Before the Court is respondent's Motion to Dismiss or Alternatively to Grant a Summary Judgment, filed April 30, 1979. Petitioner has filed a Motion for Summary Judgment or in the Alternative for an Evidentiary Hearing. In this order the Court will consider matters beyond the pleadings, which, under Rule 12(b)(6) is deemed deliberation upon a Rule 56 motion.

Petitioner, currently incarcerated at Menard Correctional Center, has applied for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. He alleges five basic claims for relief: (1) that the statute and the indictment under which he was tried were defective; (2) that a search of his rented room and seizure of evidence violated the Fourth Amendment; (3) that remarks by a prospective juror during voir dire, and conduct of the prosecutor during the trial inflamed the jury; (4) that evidence was either withheld by the State or was improperly declared inadmissible by the Court; (5) that he was denied the effective assistance of counsel.

Petitioner was found guilty by a jury on five counts of murder on January 17, 1969, in the Seventh Judicial Circuit, Sangamon County, Illinois. He was sentenced to forty to sev-

enty years. His conviction was affirmed by the Illinois Appellate Court in *People v. Parisie*, 7 Ill. App. 3d 1009, 287 N.E.2d 310 (1972). Petitioner's attempts at review by the Illinois Supreme Court and through the post-conviction relief procedure were denied. Petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b). The Court will deal with these contentions seriatim:

1. *Illegal Statute*. Petitioner alleges that the 1961 Illinois Criminal Code is unlawful. He claims that the title to the act violates the Illinois Constitution of 1870, Art. IV § 13. That constitutional provision required that a valid statute might embrace only one subject to be expressed in its title. Petitioner asserts that the title to Ill. Stat. Ann. Ch. 38 §§ 1-35 is constitutionally defective. The title requirement is intended to eliminate extraneous matters from legislation as legislators and the public would not be deceived. A statute may include every matter germane, referable, auxilliary, incidental or subsidiary to and not inconsistent with the general subject. *Co-ordinated Transport v. Barrett*, 412 Ill. 321, 106 N.E.2d 510 (1952) affd. sub nom *Bode v. Barrett*, 344 U.S. 583 (1953) reh. den. 345 U.W. 931 (1953).

The title to the Criminal Code reads: "AN ACT relating to criminal law and to repeal acts or parts of acts herein named." This title certainly encompasses homicide and gives notice that such provision is included in the Code. The statute is not, therefore, unconstitutional. See *People v. Trigg*, 97 Ill. App. 2d 261, 270, 240 N.E.2d 130, 135 (1968), holding that Ill. Stat. Ann. Ch. 38, § 22-40, part of the 1961 Code concerning fraudulent sale of non-narcotic substances did not violate Art. IV, § 13 of the 1870 Constitution. This first contention is clearly without merit.

Defective Indictment. Petitioner alleges that he was denied due process of law because he was charged under a defective indictment. The defect he claims is in the charge that on April

12, 1968, petitioner "shot and killed" decedent. C-3. The record shows deceased died on April 13, 1968.

The purpose of an indictment is to appraise the defendant of the charges against him. Unless the statute under which the indictment is brought makes time of the essence, the indictment is not defective for misstating the date on which an act occurred. *United States v. Antonelli*, 439 F.2d 1069, 1070 (1st Cir. 1971) (loanshark); *United States v. Covington*, 411 F.2d 1081, 1088-89 (4th Cir. 1969) (interstate transport of stolen automobiles); *United States v. Brodson*, 390 F.Supp. 774, 780 (D.Wis. 1975) (interstate transport of gambling devices). The statute under which petitioner was indicted is Ill. Stat. Ann. Ch. 38, § 9-1. That section does not make time a material element of the offense of homicide. Thus an indictment for murder which mistates the date of death is not fatally defective. *People v. Kane*, 68 Ill. App. 2d 486, 216 N.E.2d 207 (1966) (attempted murder); *People v. Limeberry*, 298 Ill. 355, 365-66, 131 N.E. 691, 696 (1921) (murder).

2. *Illegal Search and Seizure*. Petitioner claims that in entering his hotel room and seizing property therefrom, police performed an illegal search and seizure violating the Fourth Amendment. Federal courts are barred from considering Fourth Amendment claims on habeas corpus where there has been a full and fair hearing on the matter in the State court. *Stone v. Powell*, 428 U.S. 465, 494 (1976). The trial court held extensive hearings on petitioner-defendant's Motion to Suppress. The proceedings make up over 260 pages of the record. The trial judge heard ten witnesses and arguments of both counsel. He then denied the motion. R.Vol. XI, p. 197. This was a full and fair hearing on the motion.

3. *Remarks by prospective juror*. Petitioner alleges that certain remarks made by a prospective juror during voir dire inflamed the rest of the then empaneled jury. The transcript shows that defense counsel moved for mistrial on the grounds

of prejudice. C-211. The prospective juror stated that she felt that she was biased by her friendship with one of the expert witnesses. Petitioner alleges that the prospective juror referred to petitioner as a "habitual murderer." The record, however, shows that the prospective juror's reference to "habitual criminal" had to do with a trial on which she sat as a juror fifteen years before, and did not refer to petitioner. She was excused. C-213. Motion for mistrial was denied. The prospective juror's partiality was not found to prejudice the other jurors.

The petitioner must show "that the procedure used for testing impartiality (failed to create) a reasonable assurance that prejudice would be discovered if present." *United States v. Dellinger*, 472 F.2d 340, 369 (7th Cir 1972) *cert. denied*, 410 U.S. 970 (1973). In *United States ex rel. Caldwell v. Illinois*, 425 F.Supp. 1344, 1346 (N.D. Ill. 1977) the petition for habeas corpus claimed that the trial court's refusal to allow parties to conduct voir dire, and the Court's failure to propound certain questions did not give reasonable assurance that prejudice would be discovered. In the instant case, counsel for both parties conducted voir dire. Each prospective juror was questioned extensively about possible prejudice. After the prospective juror indicated her bias, the Court expressly asked each veniremen whether he would presume petitioner's innocence. Each one answered affirmatively. The trial court clearly employed procedures which created a reasonable assurance of impartiality.

Conduct of Prosecutor. Petitioner claims that the prosecuting attorney in his closing argument waved the murder weapon around the courtroom, aiming it at defense counsel and jury members, pulling the trigger while saying that petitioner would kill again if released. This allegedly inflamed the jury. The record, however, shows that the prosecutor held the gun to show that it could not accidentally discharge and to show from the path of the bullet, that discharge inside the car was impos-

sible. R. Vol. XXIII p. 1724-25. The record shows that the prosecutor never made any threat to the jury.

This Court recognizes that where no contemporaneous objection is made to a misstatement in an argument to the jury, that misstatement cannot serve as grounds of appeal unless it was plain error. *United States v. Castenada*, 555 F.2d 605, 610 (7th Cir.) *cert. denied*, 434 U.S. 847 (1977); *United States v. Spain*, 536 F.2d 170, 174 (7th Cir.) *cert. denied*, 424 U.S. 833 (1976). *See also, United States v. Cook*, 592 F.2d 877 (5th Cir.) *cert. denied*, 98 S.Ct. 2847 (1949) (threat to jury). In this case, no objection was made when the prosecutor waived the murder weapon.

The record, taken as a whole shows that the prosecutor's actions did not amount to plain error. Plain error is one affecting substantial rights. Federal Rules of Criminal Procedure 52(b). It is intended to rectify the ignorance of counsel. A court will employ the remedy cautiously and only in exceptional circumstances. *Castenada, supra. See also*, 3 Wright, *Federal Practice and Procedure* § 856 (1969). Counsel, during closing arguments, is allowed wide latitude to argue his case, subject to restrictions of decorum and precedent. *See generally, Caley v. Manicke*, 24 Ill. 2d 390, 183 N.E.2d 206 (1962). *LeMaster v. Chicago R.I.& P.R. Co.*, 35 Ill. App. 3d 1001, 1024-1027, 343 N.E.2d 65.84 (1976) for the wide latitude allowed in closing. In the instant case, the prosecutor's actions and remarks were reasonably sustained by evidence. He merely reviewed testimony given earlier by the coroner as to the path of bullets through decedent's body. See R. Vol. XIX, p. 1927-30. Such a review is within the bounds of propriety and is not plain error.

The same analysis can be applied to petitioner's claim that the display of the decedent's blood-stained clothing inflamed the jury. No objection was made to such a display either when petitioner was asked to authenticate the clothing. R. Vol. XXI, p. 1392-44, or in the prosecutor's closing argument. R. Vol.

XXIII, p. 1722-24. Therefore, for this Court to review this alleged impropriety, there must be plain error.

It is well accepted that any relevant fact is admissible as long as its prejudicial effect does not outweigh its probity. *People v. Ciucci*, 8 Ill. 2d 619, 624-25, 137 N.E. 23, 40, 44 (1956) affd. 356 U.S. 571 (1958), *see also Federal Rules of Evidence* 403. As the Illinois Court of Appeals noted, the clothes were relevant to petitioner's credibility concerning the circumstances of the shooting. Joining the relevance of the evidence with the latitude afforded prosecutors in making their case, this Court concludes that the prosecutor in this case did not commit plain error in cross examination or in his closing argument, *see Bergenthal v. Cady*, 466 F.2d 635, 637 (7th Cir. 1972) which noted that conduct of state prosecutors has consistently been held to fall short of a due process violation.

Remarks in Jury Deliberation. Petitioner contends that during jury deliberation a Juvenile Court Judge went into the jury room and told the jury to "sock it to him." The record, however, shows that the remark was made during the trial, R. Vol. XXIII, p. 1679, by someone in the back of the courtroom, C-244, or in the hallway, C-245.

The petitioner makes no allegation of any possible prejudice and the record discloses no such possibility. There is no indication that a comment from either the back of the courtroom or the hallway had any influence on the jury. The petitioner offers no affidavits indicating any kind of improper influence upon the jurors. The record clearly conflicts with petitioner's bald assertion. This Court sees no possibility of prejudice in light of the clear record and affidavits in this case. This contention is without merit. *See, United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974).

4. *Evidence Withheld or Suppressed.* Petitioner claims he was denied a fair trial when the State withheld evidence that

decedent died as a result of hemorrhaging caused by a surgical sponge left inside the body.

This Court must evaluate any evidence in light of the entire record to decide whether the omitted evidence creates a reasonable doubt of guilt. *United States ex rel. Moore v. Brierton*, 560 F.2d 288, 292 (7th Cir. 1977). There is no evidence in the detained medical reports of record that there was any other cause of death than by gunshot. C-176-187. Even if there were a report of negligence, it would not relieve petitioner of liability or change the result of his trial. If a dangerous injury is inflicted which is calculated to destroy life, it is no defense to a charge of homicide that decedent's death was contributed to by unskillful medical care. *People v. Olson*, 60 Ill. App. 3d 535, 538-39, 377 N.E.2d 371, 375 (1978); *People v. Stamps*, 8 Ill. App. 3d 896, 401, 201 N.E.2d 274, 279 (1972). Injuries which are inflicted by the defendant need not have constituted the sole or immediate cause of death in order for them to be considered the legal cause. *People v. Giovanetti*, 70 Ill. App. 3d 275, 387 N.E.2d 1071, 1079 (1979). There is sufficient causal vexus between the shots fired and death to make those shots the legal cause of death.

Perjured Testimony Suppressed. Petitioner claims that the arresting officer committed perjury when he testified at pretrial that he read petitioner all of his *Miranda* rights verbatim from a *Miranda* card. R. Vol. XI, p. 78-79. Petitioner alleges that the officer testified that he informed petitioner only that any statement would be used against him. There is some question about what the officer actually did testify to at the preliminary hearing. But on cross examination at pretrial, the prosecuting attorney asked whether, at the prior hearing, the officer was ever asked if he read petitioner his rights from a card. No such question had ever been asked. R. Vol. XI, p. 189-90.

A prior statement can be used to impeach but only if the prior statement is in fact inconsistent. *United States v. Crovedi*, 467

F.2d 1032, 1037 (7th Cir. 1972), *cert. denied* 410 U.S. 990 (1973). Introduction of prior consistent statements is within the discretion of the court. *United States v. Greene*, 497 F.2d 1068, 1083 (7th Cir. 1974), *cert. denied* 420 U.S. 909 (1975). There is no inference that uncertainty in the testimony of a government agent is the product of perjury. A court or jury could find that there has been a mistake or that something had not been fully explained. cf. *United States v. Spain*, 536 F.2d 170, 173 (7th Cir.) *cert. denied* 429 U.S. 833 (1976). The trial judge was well within his discretionary authority in finding that the arresting officer's testimony at the preliminary hearing did not impeach or discredit that witness at pretrial. This Court, therefore, takes the officer's testimony at pretrial as clarification or elaboration of uncertain points raised at the preliminary hearing.

5. *Ineffective Assistance of Counsel.* Petitioner claims that he was denied the effective assistance of counsel at his trial in that his counsel, Mr. Gillespie, lacked criminal trial experience. Petitioner points to several cases for the proposition that enexperience of court-appointed counsel may amount to grounds of reversal. Yet, in each of those cases, the courts mentioned some specific instance when counsel erred, which error influenced the result. In *People v. Morris*, 3 Ill. 2d 437, 121 N.E.2d 810 (1954), counsel waived a jury trial. In *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933), counsel failed to object to hearsay. In *People v. Gardiner*, 303 Ill. 204, 135 N.E.2d 422 (1922), counsel failed to object to an irrelevant argument to the jury. In *People v. Shulman*, 299 Ill. 125, 132 N.E. 530 (1921), counsel failed to properly present character testimony.

Petitioner fails to assert any specific act of Mr. Gillespie which had an effect of prejudicing the result of the trial. Mere inexperience of counsel, without more, is not enough to support a claim of ineffective assistance of counsel. *United States ex rel. Robinson v. Housewright*, 525 F.2d 988, 992 (7th Cir. 1975); *United States ex rel. Williams v. Twomey*, 510 F.2d 634,

639-39 (7th Cir. 1975). If counsel reached a standard minimum competence and zeal, then the defendant has been served.

Petitioner claims that after the trial, Mr. Gillespie wrote that he would plead his own incompetence in order to help an appeal. Letter from Robert E. Gillespie to John S. Parisie, April 4, 1979. To hold this as sufficient evidence of ineffective assistance, coming as it does over ten years after the trial, would at least be questionable. The Court notes that Mr. Gillespie was co-counsel in the trial with Walter H. Kasten. The record shows that Mr. Kasten was a Public Defender, C-11; C-258, and presumably knowledgeable of criminal procedure. No complaint is made about Mr. Kasten's representation. The Court further notes that in a motion to withdraw from the case, Mr. Gillespie wrote that he had a "heavy trial practice." C-255. All of these considerations argue against holding that the professionalism of petitioner's counsel at trial sank to the level of incompetence necessary to sustain a constitutional claim. There being no disputed issue of material fact, IT IS ORDERED that respondent's Motion for Summary Judgment be GRANTED.

IT IS SO ORDERED.

DATED: December 18, 1979

/s/ James L. Foreman
Chief Judge

CC: Judge Meyers
John Stephan Parisie, Box 711, Menard, IL 62259
Mr. Steven Teplinsky, Assistant Attorney General,
500 South Second St., Springfield, IL 62706

APPENDIX P-1

CIVIL NO. 79-2113-B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
ex rel. JOHN STEPHAN PARISIE,
Petitioner,
v.
J. W. GREER, Warden
Menard Correctional Center,
Respondent.

DISTRICT COURT
DOCKET ENTRIES

DATE	PROCEEDINGS
4- 3-79	Complaint filed.
4- 2-79	ORDER ISSUED: Leave to proceed in forma pauperis is hereby DENIED. (M), filed.
	Filing fee paid.
	ORDER ISSUED: It is, Therefore, Ordered that Respondent(s) secure and file with the Court within Thirty (30) days a complete record of the State Court proceedings about which Petitioner now complains. (M), filed.
	ORDER ISSUED: Respondent shall, within twenty-three (23) days of receipt of this application for writ of habeas corpus, answer and show cause why the writ should not issue. Service upon the Attorney General, State of Illinois, 188 W. Randolph, Chicago, IL shall constitute sufficient service. (M), filed.

DATE	PROCEEDINGS
	JS 44 filed.
	Complaint and orders sent to Defendant's via certified mail. #219391
4-13-79—	Amended Supporting Brief For Argument for the Attached Application for HC Under U.S.C. Section 2254 with Supporting Memorandum of Law, Supporting Memorandum of Law, Affidavit, and Proof of Service, filed.
	Motion for an Evidentiary Hearing & Motion for Appointment of Counsel and Proof of Service, filed.
	Motion for Appointment of Counsel, Affidavit and Proof of Service, filed.
4-30-79—	Motion to Dismiss or For Summary Judgment with Supporting Memorandum of Law, filed.
	Brief and Argument for Defendant from State Courts, filed.
	Appeal from the Circuit Court of Sangamon County, Illinois, filed in the Appellate Court 4th District 02/27/71 Brief and Argument for Defendant-Appellant, received and placed in file.
	Appeal from the Circuit Court of Sangamon County, Illinois filed in the Appellate Court 4th District 08/02/71 Reply Brief, received and placed in file.
5- 3-79—	Transcripts from the Circuit Court of Sangamon County, IL, filed in Appellate Court, 4th District received and placed with file. sh
	Transcripts of State Record in Top Drawer beside Helen's Desk.
5- 4-79—	Entire file taken to East St. Louis, with copy of docket sheets. sh

DATE	PROCEEDINGS
	Motion for Summary Judgment for the Petitioner, or in the Alternative an Evidentiary Hearing, filed. Also sent to E. St. Louis.
7- 2-79—	Traverse to the return with supporting memorandum of law.
12-18-79—	ORDER: All of these considerations argue against holding that the professionalism of petitioner's counsel at trial sank to the level of incompetence necessary to sustain a constitutional claim. There being no disputed issue of material fact. IT IS ORDERED that Respondent's Motion for Summary Judgment be GRANTED. (F). FILED Copies to parties per ktm.
	CASE CLOSED JS6MAILED
1- 3-80—	MOTION. . for extension of time to file a motion for reconsideration of an order., by ptf., filed.
2- 1-80—	MOTION. . for reconsideration of an order with supp. memo of law by ptf. filed.
4- 3-80—	Sent file to Judge Foreman.
5- 8-80—	ORDER. . Before the Court is the Motion for Reconsideration of this Court's order of Dec. 18, 1979. The Motion to Reconsider has merely reiterated the argument raised in the initial complaint in this matter. The Court fines no merit in the Motion to reconsider, and, therefore, DENIED the Motion (F), fld. Copies to parties per ktm.
6- 2-80—	NOTICE OF APPEAL BY PTF. FLD.
	Motion. . for leave to proceed in forma pauperis by ptf. fld.
	MOTION. . for leave to appeal in forma pauperis with affidavit of poverty, fld.
	MOTION. . for appt. of counsel by ptf. fld.

DATE	PROCEEDINGS
6- 2-80	Sent short record to Court of Appeals with copy to all parties.
6- 2-80	Sent file to Judge Foreman for ruling on pauperis status.
6-26-80	ORDER. . Court finds appeal taken in good faith, and therefore, issues a certificate of probable cause. Therefore, the Court GRANTS motion for leave to proceed in forma pauperis. The Court feels that a Motion for Appt. of Counsel is not a proper matter for the trial court, and therefore, DENIES that request (F), fld. copies to parties per ktm.
6-26-80	Sent file to Court of Appeals.
7-21-80	CERTIFICATE of Interest by Plaintiff.
10- 1-80	IT IS ORDERED that the clerk of the U.S. District Court for the Southern District of Illinois, Benton Division is directed to certify and transmit as a supplement to the record on appeal on or before 10-3-80, the transcripts of proceedings of the petitioner's trial in the State Court in Sangamon County. (Ct. of Appeals) Transcripts mailed to Court of Appeals, Cert. #0358170 hb.
12- 1-80	*From Court of Appeals*—"It is ORDERED that Motion to Supplement Record on Appeal be GRANTED and the clerk of the U.S. District Court of the Southern District of Illinois is directed to prepare, certify, and transmit the following items as a supplement to the record on this appeal: 1) The transcript of the preliminary hearing in petitioner's state court conviction. 2) All exhibits introduced at petitioner's state court trial. Said supplement to the record should be filed with the clerk of this court on or before December 5, 1980."

DATE	PROCEEDINGS
1-27-81	—ORDER: (Meyers) That the Clerk, Circuit Court of Sangamon County transmit the transcript of the preliminary hearing and the exhibits introduced at trial to the Clerk of this District Court. Copies to parties. cd
4-23-81	—ORDER (M) Rsp. Clerk of Sangamon County shall on or before May 11, 1981 deliver to Clerk's Office for district court portions of record previously ordered or deliver Ptf. to this Court for purposes of Court cons. ordering immediate release pending disposition of case. cc: parties & Clerk of Sangamon County.
5- 4-81	—3 boxes exhibits from state court received. EXHIBITS mailed to USCA 7th Circuit
5- 7-81	—COPY of exhibits introduced at state pretrial hearings. Exhibits intro. at state pretrial hearings to USCA 7th Circuit. c

APPENDIX P-2

No. 80-1940

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN STEPHAN PARISIE,
Petitioner-Appellant,
v.
J. W. GREER, Warden
Menard Correctional Center,
Respondent-Appellee.

COURT OF APPEALS DOCKET ENTRIES

DATE	PROCEEDINGS
7-18-80	Filed O&3c respondent's motion to dismiss appeal for want of jurisdiction svc.
7-23-80	Filed O&2c appellant's motion to dismiss respondent's motion to dismiss for want of jurisdiction, svc.
7-23-80	Filed O&3c appellant's motion for leave to appeal in forma pauperis with affidavit of poverty; motion for appointment of counsel and certificate service, svc.
7-23-80	Filed 10c appellant's brief; 10c appndx., svc.
8-20-80	Filed O&3c motion to extend time for filing appellee's brief. svc.
8-14-80	Entered order that appellee's motion to dismiss appeal is DENIED.

DATE	PROCEEDINGS
8-21-80	Entered order that motion of 8/20/80 is GRANTED and the time for filing appellee's brief is extended to and including 9/20/80. Further ordered to the appellant's reply brief will be due on or before 10/4/80.
9- 4-80	Entered order GRANTING appellant's motion of 7/23/80 for appointment of counsel and Jeffrey Bork is APPOINTED pursuant to the provisions of the CJA to represent the appellant. Further ordered that the order of 8/21 is VACATED and the following briefing schedule is adopted: 1) Appellant's supplemental brief and appndx. is due by 11/3/80. 2) Appellee's brief is due by 12/15/80. 3) Appellant's reply brief, if any, is due by 12/29/80.
9- 4-80	Entered CJA order appointing Jeffrey S. Bork as counsel for appellant.
9-26-80	Entered order that the clerk of the US Dist. Court for the Southern Dist. IL is directed to certify transmit as a supp. to the record on appeal by 10/3/80 the trans. of proceedings of petitioner's trial in the State Court in Sangamon County.
10-27-80	Filed O&3c motion for an extension of time up to and including 12/19/80 in which to file brief of appellant. afft. svc.
10-29-80	Entered order that motion of 10/27/80 is GRANTED and the following new briefing schedule is adopted: 1) The supp. brief and appdx. for appellant will be due by 12/19/80 2) The brief of the appellee will be due before 1/18/81 3) The reply brief if any, of the appellant will be due by 2/1/81.

DATE	PROCEEDINGS
11-13-80	Filed O&3c appellant's motion to supplement record on appeal., svc.
11-25-80	Entered order that motion of 11/13/80 is GRANTED and the clerk of the US dist. ct. for the Southern dist. is directed to prepare, certify and smit the following items as a supplement to this appeal: 1) The trans. of the preliminary hearing in petitioner's state court conviction. 2) All exhibits introduced at petitioner's state court trial. Said supplement to the record shall be filed with the clerk of this court by 12/5/80.
12-12-80	Filed O&3c motion for oversized brief and for extension of time up to and including 12/31/80 in which to file supplemental brief of appellant., svc.
12-16-80	Entered order that motion of 12/12/80 is GRANTED and the time for filing appellant's oversized supp. brief and appdx. not to exceed 60 typewritten pages is extended to and including 12/31/80.
12-31-80	Filed 15c supplemental brief by appellant & 10c appdx., svc.
2- 2-81	Filed O&3c appellee's motion to extend time for filing appellee's brief, afft., svc.
2- 3-81	Entered order GRANTING appellee's motion to extend time for filing appellee brief to and incl. 3-9-81. Reply brief, if any, will be due on or before 3-23-81 by appellant.
3- 9-81	Filed O&3c appellant's motion to deny appellee's motion for a second extension of time, svc.
3- 9-81	Filed O&3c appellant's motion to deny appellee's motion for a second extension of time, afft., svc.

DATE	PROCEEDINGS
*3- 6-81	—Filed O&3c appellee's motion to extend time for filing brief, afft., svc.
4- 6-81	—Filed O&3c appellee's motion to extend time for filing brief, svc.
4- 6-81	—Filed O&3c motion to deny appellee's third motion for extension of time to file brief., svc.
4-29-81	—Entered order GRANTING appellee's motion to extend time for filing appellee's brief on or before 5-9-81; reply brief, if any, will be due on or before 5-23-81.
5-11-81	—Filed O&3c appellee's motion to extend time for filing brief, svc., afft.
5-13-81	—Entered order GRANTING appellee's motion to extend time for filing brief but only to & in 3 PM on 5-22-81. If brief is not filed on time appeal will be heard without brief. Appellant's reply brief due on or before 6-4-81. Oral argument in this appeal will be set for the week of 6-8-81.
5-19-81	—Entered order setting appeal for oral argument on Wed. 6-10-81 9:30 AM. Oral argument limited to 20 min. ea. side.
5-17-81	—BRIEFS DISTRIBUTED TO PANEL
5-22-81	—Filed 15c appellee's brief, svc.
6- 4-81	—Filed 15c appellant's reply brief & supplemental appdx., svc.
6-10-81	—Heard and taken under advisement.
10- 1-81	—Filed O&3c appellant's motion to release transc., svc.
10-20-81	—Entered order GRANTING appellant's motion and clerk is to send to state court counsel the 22 vol. of transc. on file in this court. Counsel to return transc. on or before 11-15-81. If counsel needs more time, she should apply for extension with clerk of this court.

DATE	PROCEEDINGS
1- 7-82	Filed O&3c appellee's motion for release & return of transc., afft.
1-28-81	Entered order that motion for release & return of transcripts is DENIED. Denial is without prejudice to counsel's reapplication for release & return of transcripts on or before 3-15-82.
2-18-81	Filed Opinion by J. East, REVERSED & REMANDED, J. Cudahy Dissenting in part.
2-18-81	Entered final judgment order, REVERSED AND REMANDED, J. Cudahy dissenting in part.
2-25-82	Filed O&3c appellee's motion for release and return of transcripts.
3- 8-82	Filed O&3c appellee's motion for leave to file petition for rehearing & suggestion for rehearing in banc, instanter, petition tendered.
3-11-82	Entered order GRANTING appellee's motion and clerk is to file instanter 25 tendered copies of appellee's petition for rehearing and suggestion for rehearing in banc.
3-11-82	Filed per order 25c petition for rehearing & in banc.
3-16-82	Filed notice to appellant's counsel to file an answer to the petition for rehearing & en banc, on or before 3-26-82. 25c required.
3-17-82	Entered order DENYING appellee's motion of 2/25/82. Respondent's petition for rehearing is before the court. This order is w/o prejudice to renewed application on 4/15/82.
3-26-82	Filed 25c petitioner's answer to State's petition for rehearing & en banc dist.

DATE	PROCEEDINGS
4- 2-82	Filed appellee's motion for leave to file reply to petitioner's answer to State's petition for rehearing with suggestion for rehearing en banc. 25 reply tendered.
4- 6-82	Entered order GRANTING appellee's motion and clerk is to file instanter 25c of appellee's "Reply to petitioner's answer to the state's petition for rehearing and en banc" and distribute them to the panel.
4- 6-82	Filed per order 25c appellee's reply to petitioner's answer to State's petition for rehearing and en banc. dist.
6- 2-82	ORDER: DENIED petition for rehearing; J. Cudahy concurring. J. East specially concurring.
6-10-82	Filed appellee's motion for clarification.
6-10-82	Filed appellee's motion to stay mandate.
6-10-82	Filed appellant's memo in opposition to respondent's motion to stay mandate.
8- 5-82	ORDER: GRANTED petition for rehearing and en banc.
9-10-82	ORDER: Notice of Oral Argument setting date for oral argument on Tues. 10-19-82 at 10:30 AM. Further ordered that oral argument be limited to 20 min. ea. side. Per order of 8-5-82, this case is being reheard *en banc*.
10- 1-82	BRIEFS DISTRIBUTED TO PANEL.
10- 1-82	Filed Parisie's motion to dismiss the en banc proceeding.
10-19-82	ORDER: DENIED appellant's motion to dismiss en banc.
10-19-82	Reheard en banc & taken under advisement.

DATE	PROCEEDINGS
2- 1-83	Filed appellee's citation of addtl auto. per cir. rule 11 o&18c dist. to panel en banc. Re Reply to Petitioner's answer to the State's Petition for rehearing and suggestion for rehearing en banc.
3-28-83	Filed Opinion per curiam. VACATED panel decision; judgment of dist. ct. AFFIRMED. J. Bauer AFFIRMS dist. ct.; J. Wood DISSENTS, J. Cudahy CONCURS with J. Swygert; J. ESCHBACH dissenting in part from panel; J. Posner (s Opinion) J. Swygert with J. Cummings & Cudahy (see Opinion)
3-28-83	ORDER: Final per curiam judgment. AFFIRMED & VACATED.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Jeffrey S. Bork
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Court-appointed attorney for
respondent John Parisie

OF COUNSEL:

GEORGE W. JONES, JR.

SIDLEY & AUSTIN

Dated: September 21, 1983

QUESTION PRESENTED

Whether the notice of appeal in this case was timely filed as so held by the Court of Appeals on four separate occasions.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
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JOHN STEPHAN PARISIE,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts pertinent to the State's petition for writ of certiorari are succinctly set forth by Judge Swygert in his opinion below, Parisie v. Greer, 705 F.2d 882, 895 (7th Cir. 1983)(Pet. App. at 27):

> The district court granted the state's motion for summary judgment on December 18, 1979. On December 27, 1979, Parisie acting pro se, mailed a motion to extend the time for filing a motion to reconsider, on which the court never ruled. The basis for this request, to which the state did not object, was Parisie's lack of access to the prison law library because of abbreviated holiday hours. Parisie filed his motion to reconsider on February 1, 1980, and the district court denied it on the merits on May 8, 1980. Parisie filed a notice of appeal on June 2, 1980.

On appeal the State argued that Parisie's post-judgment motions were untimely and, therefore, his notice

of appeal was untimely as well.* The Court of Appeals rejected this jurisdictional argument in (1) its order denying the State's motion to dismiss for want of jurisdiction (Pet. App. at 81), (2) the original panel decision (id. at 62), (3) the order denying rehearing (id. at 46), and (4) the en banc order under review here (id. at 1).

REASONS FOR DENYING THE PETITION

1. Because the District Court failed to enter judgment "on a separate document" as expressly required by Fed. R. Civ. P. 58, the time for filing a notice of appeal never began. See United States v. Indrelunas, 411 U.S. 216 (1973). Thus, it is apparent that Parisie's notice of appeal was timely. Because the failure to enter judgment on a separate document does not affect the "finality" of the judgment for purposes of 28 U.S.C. § 1291, see Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 n.7 (1978), the Court of Appeals correctly held that it had jurisdiction.

Even if the District Court had entered judgment on a separate document, Parisie's pro se post-judgment motions would have tolled the time for filing a notice of appeal. Nine days after the District Court granted the State's motion for summary judgment, Parisie moved to extend the time within which to file a motion for reconsideration (see Fed. R. Civ. P. 59(e)). No such extensions may be granted (see Fed. R. Civ. P. 6(b)), but Parisie's failure to notice

* Both the State's appellate brief and its petition for rehearing with suggestion for rehearing en banc, in which the State advanced its "timeliness" argument, were themselves untimely filed (see Parisie, supra, 705 F.2d at 898 n.5; Pet. App. at 33 n.5).

the Rule 6(b) provision is certainly understandable. Neither the State nor the District Court raised any question as to the timeliness of the motion.* Under the circumstances, Parisie's motion for an extension of time should be deemed a motion for reconsideration under Rule 59(e). See Haines v. Kerner, 404 U.S. 519 (1972); Foman v. Davis, 371 U.S. 178 (1962). On this view, Parisie's supporting memorandum may have been late, but that would not affect the tolling of the time for filing a notice of appeal (see Fed. R. App. P. 4(a)(4)).**

Indeed, the District Court's actions suggest strongly that it treated the motion for an extension of time as a timely motion for reconsideration, which was to be followed by a supporting memorandum. The experienced District Court judge doubtless was aware of the limitations imposed by Rule 6(b). Yet, he never ruled on the motion for an extension of time, and he denied the motion to reconsider on the merits, and not on the ground of untimeliness (see Pet. App. at 91). See Wolfson v. Hankin, 376 U.S. 203 (1964); Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964).

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* Had the State objected, the District Court undoubtedly would have advised Parisie of Rule 6(b), and there would still have been sufficient time for Parisie to have filed a notice of appeal within 30 days of the December 18, 1979 order.

** It is irrelevant that Parisie ultimately styled his pro se motion to reconsider as one under Rule 60(b) rather than Rule 59(e). See, e.g., Browder v. Illinois Department of Corrections, 434 U.S. 252, 272 (1978)(Blackmun, J., concurring); Dove v. Codesco, 569 F.2d 807, 809 (4th Cir. 1978); Alley v. Dodge Hotel, 551 F.2d 442, 444-45 n.14 (D.C. Cir.), cert. denied, 431 U.S. 958 (1977); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 537 F.2d 1058, 1061 (9th Cir. 1976). See also Fed. R. Civ. P. 8(f)("All pleadings shall be construed as to do substantial justice").

However Parisie's motion is characterized, it is plain that the Court of Appeals had jurisdiction in this case. Under Fed. R. Civ. P. 60(b)(6), a motion to vacate a judgment may be made at any "reasonable time" after the judgment. Parisie's motion was clearly filed within a reasonable time after judgment, and his notice of appeal was filed within 30 days after that motion was denied. Accordingly, at the very least, the Court of Appeals had jurisdiction to review the District Court's denial of the motion for abuse of discretion. See, e.g., Browder v. Illinois Department of Corrections, 434 U.S. 257, 263 n.7 (1978); see also, id. at 272-274 (Blackmun, J., concurring).

2. The State's reliance on Browder, supra, is wholly misplaced. As this Court recently observed, "It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 74 L. Ed. 2d 225, 230 (1982), quoting Browder, supra, 434 U.S. at 264. Nothing in the holding of the Court of Appeals is to the contrary. The only question presented by the State's petition here is whether Parisie's notice of appeal was timely. For the reasons already stated, it is clear beyond any serious dispute that it was. Since the State prevailed on the merits, it has no basis for complaining of the standard of review, which might differ depending on the theory of jurisdiction.

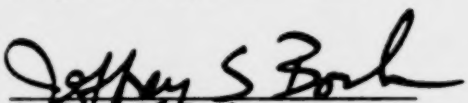
3. If the Court grants Parisie's petition for a writ of certiorari, No. 83-5300 (filed Aug. 25, 1983), the State will be free to raise its jurisdictional arguments. See, e.g., Nixon v. Fitzgerald, 73 L. Ed. 2d 349, 358

(1982). If the Court denies that petition, there is no reason to consider the question of the "correct" jurisdictional theory. Indeed, it is somewhat difficult to understand the State's interest in independently pursuing this abstract question of law. The State prevailed in both the District Court and the Court of Appeals and therefore vacating the judgment below would be of little consequence to either party.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals, therefore, should be denied.

Respectfully submitted,



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Dated: September 21, 1983

PROOF OF SERVICE

Jeffrey S. Bork, an attorney, certifies that he caused two copies of the foregoing Brief in Opposition to be mailed, with first-class postage prepaid, this 21st day of September, 1983.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent John Parisie moves this Court for an order permitting him to proceed in forma pauperis. The undersigned was appointed pursuant to the Criminal Justice Act of 1964, as amended, by the United States Court of Appeals for the Seventh Circuit to represent respondent in that Court and, because of his familiarity with the record, respondent desires that he be reappointed in this proceeding. Respondent has consented to the undersigned's continued representation.

Respectfully submitted,

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Court-appointed attorney for
John Parisie in U.S. Court of
Appeals for the Seventh Circuit.